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CONVEYANCER'S NOTEBOOK

EMERGENCY REGULATIONS

Although we do not overlook that a good deal of the allegedly temporary emergency regulations have become incorporated in permanent legislation, it is pleasant to record that there are no emergency regulations of special interest to conveyancers which are continued this year. On the contrary, we have seen the passing from November 10 last of building licences: Defence Regulations (No. 7) Order, 1954 (S.I. 1478).

HOUSING REPAIRS AND RENTS ACT, 1954, SS. 24 AND 40

In a memorandum to rent tribunals (HRR 3, November, 1954) the Minister of Housing and Local Government, after stating that, as tribunals are aware, he has no power to give an authoritative ruling, modestly states " the true intent and meaning " of section 24 (3) (b) of the Housing Repairs and Rents Act, 1954 (which provides for the deduction of the part of the gross rent representing payment for furniture or services in order to arrive at the net rent, which is the basis of the " stopper " clause). The memorandum goes on to state that where there are simultaneous applications under section 24 to arrive at the net rent and section 40 to decide the amount which a landlord is entitled to claim by way of increase in the cost of services provided under a pre-1939 letting, the latter application should be dealt with first. Where there is no application under section 40, the tribunal should inquire whether there is agreement under that section and, if so, the amount of the sum

agreed, before making a determination on the section 24 application. The memorandum is not very explicit on what the tribunal should do if there is only an application under section 24 and no agreement under section 40.

Town and Country Planning Act, 1954
Two Important Dates

We publish in this issue Mr. J. F. Garner's article on the Town and Country Planning Act, 1954, but we may be excused for drawing especial attention to two time limits. All applications for payment under Part I of the Act (that is, for loss of development value actually incurred as a result of past acts or events, *e.g.*, where a development charge has been paid or land has been compulsorily acquired or sold at its restricted value) must be sent to the Central Land Board not later than April 30 next. The claim must be made on a form issued by and obtainable from the Board. Although the forms have been issued automatically, if a form has not been received and returned completed in any particular case, the solicitor acting should see to the question without delay. It can hardly be over-emphasized that the remaining time expires shortly after this Easter. See the Central Land Board Payments Regulations, 1954 (S.I. 1954, No. 1599).

Claims for compensation under Part V (that is, for past refusal of planning permission, for the imposition of onerous terms on granting permission or for revocation or modification of planning permission) must be made not later than June 30 next. These claims go to the local authority and are in the prescribed form. See the Town and Country Planning (Compensation) Regulations, 1954 (S.I. 1954, No. 1600).

Journal of Planning and Property Law

At the beginning of last year the *Journal of Planning Law* was amalgamated with *Current Property Law* under the above title and the marriage appears to have been entirely successful. A good deal of the *Current Law* technique injects an efficiency into the journal which enables a wealth of less easily accessible law to be uncovered; particularly useful are its Lands Tribunal decisions. Fortunately, the indigestible form of a digest, no doubt necessary in *Current Law*, is not part of the journal's make-up. Whether we like it or not, planning is now a permanent feature and, so long as it ebbs, flows and eddies as it has done since 1947, we must rely on the journal as a compulsory pilot.

THE SALE OF FLATS (*a*)

By Edward F. George, ll.b., Solicitor.

Although the sale of flats in England was by no means unknown before the war, interest in the subject has considerably increased in recent years for a variety of reasons: landlords have wished to escape from the shackles of the Rent Restrictions Acts (*b*); would-be owners have found the prices of houses too high; the shortage of domestic help has increased the demand for smaller accommodation; and changing social conditions have caused many more town-dwellers to prefer flats to houses quite apart from other considerations. Although some of the reasons may be only of temporary validity, it seems clear that flat-owners are to be a permanent feature of the conveyancing scene. Although English case law has not covered the subject to the same extent as Scottish, in general the principles are not obscure, but it cannot be said that the practice and forms of precedents are settled. The purpose of this article is to examine the practice and draw attention to the principal points arising.

Freehold or Leasehold

Just as, today, the Revenue is a partner in every business, holding a leonine share, so, in most property transactions, there is a much more helpful and considerably less rapacious party in the form of a building society or local authority. Although building societies have been happily lending to flat-owners in Scotland for some time, they have been much more timid in England and, in this respect, local authorities have been much more progressive. Some building societies will not lend at all, others only on two-storied buildings; and almost all want a continuing arrangement under the Building Societies Act, 1939. It is clear at the outset that the vendor of flats will usually have to arrange the financing of the purchases in advance; it is not much use putting up the building and then finding that neither the local authority nor a building society will lend; nor is it any use offering freeholds if the building society will only lend on leaseholds, which is sometimes

(*a*) A precedent by Mr. George of a Transfer of a freehold flat, being one in a block, will be found on p. 651.

(*b*) The Acts do not apply to dwelling-houses converted or erected after August 30, 1954: Housing Repairs and Rent Act, 1954, s. 35.

the case. In selling flats the whole conveyancing procedure is reversed: the first thing is to settle the form of lease or conveyance.

There seems to be a general belief that leaseholds are preferable to freeholds: it is said that the tenure existing between landlord and tenant securely anchors the positive covenants. In practice, however, it is the lessee who wants security and he wants to be able to enforce the positive obligations against the other flat-owners, and it seems doubtful whether there is much to choose between freehold and leasehold. Many prospective buyers would prefer freehold to leasehold, however long the term. There is one consideration relevant to the choice that does not appear to have received sufficient attention and that is the liability for Schedule A tax.

Schedule A Tax on Leaseholds

If long leases are granted of flats in a block, the owner taking substantial premiums and low rents, who is liable for the Schedule A tax? In answering this question, we must consider two sections of the Income Tax Act, 1952, ss. 109 and 113. The former (subs. (1)) provides: " The assessment and charge under Schedule A shall be made upon the landlord in respect of . . . any house or building let in different apartments or tenements and occupied by two or more persons severally, and any house or building let in different apartments or tenements and occupied by two or more persons severally shall be assessed and charged as one entire house or tenement." Section 113 provides: " Where a house is divided into distinct properties and occupied by distinct owners, or their respective tenants, such properties shall be separately assessed and charged under Schedule A on the respective occupiers thereof."

Whatever may be the true construction of these sections, in practice where the landlord grants long leases at very low rents many Inspectors of Taxes assess the lessees, at any rate where the landlord does not retain the common parts of the building, but the practice has not in the past been universal and lessors have found themselves in serious difficulties in some cases. The present practice was stated in a reply to a question in Parliament in the following terms: " The Inland Revenue have been advised that in cases [where flats were let over long periods at a rent less than the annual value on payment of a premium] the Schedule A assessment should be on the occupier by virtue of the provisions of sections 105 and 113 of the Income Tax Act, 1952, and that is the basis of the present Departmental practice. The legal position is not free from doubt, and from some textbooks the view might be formed that the assessment would be on the landlord. It is likely that the

matter will be tested in the courts fairly soon. I should add that this answer does not affect the ordinary case where all the flats in a building are let at full rents, with no premium, where the landlord is assessable under section 109 of the Income Tax Act, 1952 (*c*)," Even if the Inspector agrees to assess the lessees, the lessor is not necessarily secure for there is nothing to prevent a lessee challenging the assessment on himself at any time.

The sections have their origin in legislation going back before modern blocks of flats were known and, it seems clear, that leases at less than rack-rents were not contemplated, for it is provided that where a landlord upon whom an assessment is made under section 109 (1) makes default in payment of the tax the Revenue may recover the tax from the occupier who can deduct the tax out of the next payment on account of rent : subs. (6). It was suggested in the *Estates Gazette*, vol. 160, p. 307, that in some cases lessees might be assessable under section 113, namely, where the rents were not originally, or are no longer, rack-rents, but this suggestion does not appear to be in accordance with authority. In *Towle* v. *Improved Industrial Dwelling Co. Ltd.* [1931] 1 K.B. 263 the Court of Appeal, following the *Westminster Chambers* case (*Att.-Gen.* v. *Mutual Tontine Westminster Chambers Association* (1876) 1 Ex.D. 469), held that blocks of self-contained flats are properly assessable under what is now section 109 of the Income Tax Act, 1952, the unit of assessment being the block of flats approached through the same entrance from the street. The landlords there sought to argue that a distinction should be drawn between blocks having a street door to the common staircase and blocks where the staircase is open to the street, but this distinction was rejected by the court. Apparently it is only where the flat has a separate entrance to the street that assessment should be under section 113, but some comfort may be found in the words of Lord Hanworth M.R. [1931] 1 K.B., at p. 279: " I would, however, like to add that it appears to me that the question—What is the entity which is to be treated as a house?—is one of fact rather than of law. It is one of degree on which different minds might form different opinions. It is just the sort of point on which the Court is entitled to accept the decision of the Commissioners unless they have, in reaching their conclusion, made an error in point of law."

Contract, Costs and Stamp Duty

The contract will, in essence, be extremely simple as the standard form of lease or transfer will be annexed to it. There

(*c*) *Hansard*, July 2, 1954, col. 135.

can be no doubt that if the vendor's title is not already registered this should be done first. There will not be any saving to the vendor in scale costs on the sale but the amount of work that will be saved is considerable and the position of the purchasers, especially in relation to their mortgages, improved. The vendor's solicitor has enough work to do without having to add to his burden by deducing title to numerous purchasers, there will be no need to have the transfers executed in duplicate and the form of transfer can be submitted to the Land Registry for approval. If the transactions are to be effected by way of leases, there is the added advantage that the purchasers will be able to obtain absolute titles.

Even where the flats are sold freehold, the vendor will usually reserve rentcharges. Technically, the purchasers' solicitors are entitled to draw the conveyance, for a vendor can only stipulate actually to draw the conveyance where the only consideration is the reservation of a rentcharge, though he is entitled to stipulate to supply a form of conveyance from which the draft is to be prepared, which comes to much the same thing (*d*). Owing to the number of copies that will be required, a vendor is almost certain to print the forms of transfer and only a singularly obtuse solicitor would wish to put himself to the trouble of altering the form.

Under the general law, if the transaction is effected by way of lease, the lessee would pay the lessor's costs and have no right to call for the lessor's title. As the reality of the matter is that flats are being sold the lessee ought not to pay the lessor's costs and ought to be allowed to see the lessor's title; in practice a building society or local authority lending on the security of the flat would want to be satisfied as to the vendor's title. The stamp duty on the lease and counterpart should be borne by the lessee. In this connexion it may be noted that the reduced rates of stamp duty on premiums not exceeding £3,450 are only applicable where the rent does not exceed £20 per annum (*e*).

The stamp duty will be calculated on the premium plus twenty times the annual amount of the rentcharge (*f*). Although the amount of stamp duty will not normally be an important element in deciding whether the transactions should be effected by lease or sale, in some cases there will be a material difference according to the method employed. Thus, if the premium is £1,500 and the annual payment £25, the total stamp duty on sale would be £20, whereas on a lease for 99 years it would be £33.

Whether the transaction is by way of sale or lease, and whether

(*d*) Law of Property Act, 1925, s. 48.
(*e*) Revenue Act, 1911, s. 15; Finance Act, 1947, s. 54 (6).
(*f*) Stamp Act. 1891, s. 56.

the land is registered (*g*) or unregistered, the solicitors' scale charges are the same. The transaction falls under Sched. I, Pt. 2, Second Scale, to the Solicitors' Remuneration General Order, 1882, as amended, the vendor's or lessor's solicitor being entitled to a fee calculated on both the rent and the premium, the purchaser's or lessee's solicitor being entitled to one-half of such fee (*h*). In addition the solicitors are entitled to charge under Sched. II for deducing and investigating title (*i*). So far as the vendor's solicitor is concerned it would appear, however, to be a matter of doubt whether he is entitled to the scale fee under Sched. I, Pt. 2, on each sale. In *Wellby* v. *Still* [1895] 1 Ch. 524 it was held that where a printed form of lease was used, so that, once it had been settled, its completion in any particular case was a mere matter of detail not requiring the exercise of knowledge, skill or industry, he was not entitled to the scale fee. Despite this, the Council of the Law Society has given a number of subsequent opinions to the contrary effect (*k*). In practice, the vendor will have to do a good deal of preliminary work unconnected with any particular sale and it would seem proper to charge rather under Sched. II than Sched. I. Whether the vendor's solicitor is remunerated under Sched. I or Sched. II, the purchaser's solicitors' scale is unaffected (*l*).

Form of Transfer

In drafting the form of transfer it is desirable, if not essential, that one form should be used for all flats in the block, as otherwise it may be found that all the pieces of the jig-saw do not fit exactly. There is no need to deal with a form of lease separately as a form of transfer can easily be adapted. The matters requiring specific attention are: (i) the parcels; (ii) the easements benefiting and burdening the property; (iii) the purchaser's covenants; (iv) the rentcharge and right of re-entry; (v) the vendor's covenants; and (vi) the common parts and the position if the vendor disappears.

The parcels. The parcels present comparatively little difficulty. Although there is almost bound to be some part of the block which is not transferred to any flat owner, such as the forecourt and back garden, it is desirable to leave as little as possible outstanding. Accordingly, the stairs and passages inside the building should be

(*g*) Solicitors' Remuneration (Registered Land) Order, 1925, para. 1 (b).
(*h*) *Law Society's Digest* (1954) vol. 1, Opinion No. 1045.
(*i*) *Re Robson* (1890) 45 Ch.D. 71.
(*k*) *Law Society's Digest* (1954) vol. 1, Opinion Nos. 843, 845; but see Opinion No. 1135.
(*l*) *Law Society's Digest* (1954) vol. 1, Opinion No. 1094.

transferred to the appropriate flat-owners, subject to necessary easements; the soil will pass to the ground floor flat owners and the roof to the top flat owners. The fuel bunkers and dustbins should not be overlooked. As a flat-owner will have exclusive use of his fuel bunker this should be transferred as part of the freehold, for there cannot be an easement conferring an exclusive right (*m*). Whether he is given an easement with respect to the place for keeping dustbins will depend on whether he has exclusive rights or whether some or all of the flat-owners' dustbins are kept together (*n*).

Attention is drawn to the Land Registration Rules, 1925, s. 54, which provides that, on registration of a proprietor of a flat, a plan shall be furnished of the surface over which the tenement to be registered lies, and such further verbal or other description as the Registrar may deem necessary, together with notice of any appurtenant rights of access, whether held in common with others or not, or obligations affecting other tenements for the benefit of the tenement the title to which is being registered. Although there is a proviso that, if the applicant leaves in the Registry a reference to the General Map showing with sufficient accuracy the land affected by the application, it is not necessary to provide a plan, it will in practice be found essential to transfer by reference to a plan.

The Easements. The principal easements to be annexed to the flat are of access, support and shelter. The rights of support and shelter are those which cause the difficulty, for an easement is essentially negative in nature and, with one exception not relevant to the matter under discussion, it can never impose a positive obligation on the owner of the servient tenement. The position where there is an easement of support—and an easement of shelter is analogous—was described by Sir Wilfrid Greene M.R., as he then was, in these terms (*o*): "The owner of the servient tenement is under no obligation to repair that part of his building which provides support for his neighbour. He can let it fall into decay. If he does so, and support is removed, the owner of the dominant tenement has no cause for complaint. On the other hand, the owner of the dominant tenement is not bound to sit by and watch the gradual deterioration of the support constituted by his neighbour's building. He is entitled to enter and take the necessary steps to ensure that the support continues by effecting repairs, and so forth, to the part of the building which gives the support. But

(*m*) *Copeland* v. *Greenhalf* [1952] 1 All E.R. 809.
(*n*) See *Wright* v. *Macadam* [1949] 2 K.B. 744.
(*o*) *Bond* v. *Nottingham Corporation* [1940] Ch. 429, at p. 438.

what the owner of the servient tenement is not entitled to do is, by an act of his own, to remove the support without providing an equivalent." In order to ensure that the burden of carrying out repairs, etc., is borne equitably, special provision has to be made, and this is dealt with below under the heading " The Purchaser's Covenants."

In addition to the rights of access to the flat itself, the flat-owner will need access to other parts of the building for the purpose of repairs, laying cables, etc., and the usual rights of passage and running of water, soil, gas and electricity.

If there is a garden to be used by the flat-owners in common, the flat-owner will be given a right to use it for recreation. Farwell J. in *International Tea Stores Co.* v. *Hobbs* (*p*) said that the right of using a garden for enjoyment was a mere *jus spatiendi*, a right the existence of which was not known to the law, but the learned judge was clearly not referring to a garden used in common by the owners or occupiers of a particular building or set of buildings, such as houses in a square. It seems clear that a right to use a garden in this way can exist as an easement (*q*). If the fee simple in a garden to be used in common were transferred to the flat-owners, it would become subject to a trust for sale (*r*). The right over the garden should accordingly be drafted as easements.

The easements burdening the flat conveyed will be precisely equivalent to those annexed to it.

The Purchaser's Covenants. The purchaser will enter into restrictive covenants as to user, etc., designed to keep up the character of the property and will be given the benefit of similar covenants entered into by the other flat owners. Such covenants should, in practice, be the barest minimum necessary to achieve their purpose. As it will be apparent from a recital in the transfer that there is a scheme covering all the flats, there will be no difficulty in annexing both the benefit and the burden of such covenants. Indeed, the position would be the same if the scheme were effected by grants of leases instead of transfers in fee simple (*s*).

If a rentcharge is reserved there will be a covenant to pay the rentcharge. In addition there will be certain positive covenants:

(*p*) [1903] 2 Ch. 165, at p. 172; and see *Att.-Gen.* v. *Antrobus* [1915] 2 Ch. 188, at p. 198, also per Farwell J.

(*q*) See *Keith* v. *Twentieth Century Club* (1904) 73 L.J.Ch. 545.

(*r*) It is curious to note that the transitional provisions of the Law of Property Act, 1925, deal with an open space held in community at the end of 1925: s. 39 and Sched. I, Pt. V, para. 2; but no special provision is made for an open space conveyed in community after 1925, s. 38, which deals with party structures, being limited to structures.

(*s*) *Newman* v. *Real Estate Debenture Corpn.* [1940] 1 All E.R. 131; *Kelly* v. *Battershell* [1949] 2 All E.R. 830.

to keep in repair, to insure, to pay a due proportion of rates, etc., if the flat is not separately assessed, to permit the vendor and other flat-owners to enter for the purpose of carrying out repairs, etc., to the building and other flats, and to pay a due proportion of the upkeep of the main structure and common parts. The strongest objection to the transfer of flats in fee simple is said to be the inability of making the burden of positive covenants run with the land, but if the covenants are examined it will be seen that really they can all be reduced to one element, the payment of money. A flat-owner wishes to be assured that the common parts are kept in proper repair (*t*) and that he only has to pay his fair proportion of the cost. Although, therefore, a covenant to repair is imposed on each flat-owner the burden of repairing the main structure is placed on the vendor's shoulders and he is entitled to recover a proportionate part of the cost from each flat-owner. In the last resort, therefore, the flat-owner's real obligation is to pay money and there is no doubt that this obligation can be enforced (*u*). He will enjoy his easements subject to his obligation to contribute; and no payment, no easements; and no easements, no access.

Although it is commonly said that the enforceability of positive covenants can be assured by annexing a right of re-entry and particularly if the right of re-entry is annexed to a rentcharge (*a*), there is a good deal of obscurity surrounding the law relating to rights of entry and re-entry. Such rights may well be reserved but, strictly, they do not seem to be necessary to the scheme.

It is possible to arrange the insurance of the flats separately and, if each flat-owner is obliged to insure with the same insurers, the necessity of the vendor insuring the block is avoided. The covenant to permit the vendor and the other flat-owners to enter for the purpose of carrying out repairs, etc., is inserted *ex abundanti cautela*.

The Rentcharge. The reservation of a rentcharge serves a dual purpose: it gives the vendor a sufficient interest in the flats as a whole to enable him to enforce the obligations necessary in the common interest of the flat-owners, and it gives the flat-owners a lever to oblige him to carry out his obligations. Although an undoubtedly effective right of re-entry can be annexed to the

(*t*) There is, at common law, no right of contribution between co-owners for ordinary repairs: *Re Jones* [1893] 2 Ch. 461; *Kenrick* v. *Mountseven* (1899) 48 W.R. 141; and this would appear to be the position today as regards party structures.

(*u*) See Scammell's "Positive Covenants in Conveyances of the Fee Simple," 18 *Conveyancer*, p. 546, particularly at pp. 561–564.

(*a*) See, *e.g.*, 14 *Conveyancer*, pp. 354–357; *Law Journal* (1952) vol. 102, p. 577.

rentcharge sufficient to enable the vendor to enforce the positive covenants against the flat-owners, the defect of this device—a defect which seems to have been overlooked by some writers—is that the person subject to the rentcharge can at any time redeem it under the Law of Property Act, 1925, s. 191. It is rather in the interests of the flat-owners not to redeem the rentcharges as they will wish to have someone interested in the building who will see to the maintenance of the common parts.

The Vendor's Covenants. There has got to be someone who is going to see to the maintenance and decoration of the common parts, keeping the common passages, etc., clean and lighted and keeping the garden in order, and generally that " someone " will have to be the vendor. His obligations are, of course, subject to the flat-owners paying the cost.

The common Parts and the Disappearance of the Vendor. There is almost certain to be some part of the premises, such as the garden and forecourt, which is not conveyed to any particular flat-owner, and which is of no use by itself. The vendor's position after he has sold the flats is in reality that of a rentcharge owner on whom an obligation is placed to see that the scheme works smoothly. If the flat-owners can agree among themselves his obligation is, as it were, suspended. Accordingly, the residue of the premises in equity belongs to the flat-owners and the vendor should declare himself a trustee thereof and of the covenants in his favour so far as they are for the benefit of the flats generally in favour of the flat-owners.

The vendor may disappear or go bankrupt and, although the transfers give the flat-owners sufficient easements to safeguard the security and maintenance of their flats, some device is desirable to secure that there continues to be someone with the vendor's obligation as referee between the flat-owners. By linking the rentcharges with the obligation the flat-owners are given such a device. In other words, the transfer will provide that the vendor can only sell the rentcharges if he appoints the transferee trustee in his place. At the same time, this enables the flat owners to combine to form a managing company if they so wish.

It should be noted that the Land Registration Act, 1925, s. 74, provides that, subject to the provisions of the Act as to settled land, neither the registrar nor any person dealing with a registered estate or charge shall be affected with notice of a trust express, implied or constructive, and references to trusts shall, so far as possible, be excluded from the register. If, however, the vendor as trustee sells his interest he will be bound unless he appoints a trustee

in his place who, in his turn, will remain bound until he appoints a trustee in his place; and, in practice, a purchaser is bound to know of the trust because of the transfers by which they were first created.

Registration of the Transfers

There will be no need for the transfers to be executed in duplicate as the vendor will get an office copy of the transfer bound in with the land certificate relating to the rentcharge. On registration, in addition to the original transfer, two certified copies of the transfer and plan will have to be lodged. A fee will be payable under Scale 4 on the purchase price, under Scale 2 on the rentcharge and under Scale 1 in respect of the registration of the first proprietorship of the rent (*b*). The last item will in most cases be 10s. and should fall on the vendor.

(*b*) Land Registration Fee Order, 1930, Fee Order Rules, r. 11.

THE TOWN AND COUNTRY PLANNING ACT, 1954

By J. F. Garner, ll.m., Solicitor

In this account of the provisions of the Town and Country Planning Act, 1954 (*a*), which we hope will be of assistance to the conveyancer in private practice, we shall unfortunately often be obliged to descend to petty detail—but the Act is like that. It is an extremely complicated measure, and for the number of examples of jargon, cross referencing, and legislation by reference to earlier legislation (usually, of course, the 1947 Act), we feel it would win a prize in any parliamentary draftsmen's competition. At times it is extremely difficult to appreciate the practical effect of any particular provision, especially those which depend on the attitude to be taken by the Central Land Board (or the Lands Tribunal) in a particular case. Nevertheless, in spite of its seventy-odd sections, and its complex verbiage, we feel that the importance of the Act has really been over-exaggerated in advance—the principal Act remains that of 1947, and the present measure only clears up one aspect—admittedly an important one to some (but not all) people—and makes a few piecemeal amendments in our planning law.

The major object of the Act is to arrange for the payment of most of the outstanding claims for loss of development value originally created by Part VI of the 1947 Act, and since June 30, 1949 (*b*), existing in a state of suspended animation, of dubious value and often half forgotten. Conveyancers will now have to bring out the records of these claims from their clients' deed boxes, dust them over and examine them afresh in the light of the new Act; and it should be remembered that in most cases it is an essential prerequisite of payment under the Act that there should be an *established* claim, *i.e.*, one duly lodged and determined under Part VI of the 1947 Act and the relevant Regulations, " as being the development value of the interest to which the claim related " (*c*). The only exception to this general principle is to be found in section 35 (*d*) (apart from claims under Part IV, which Part only amends the procedure for claiming compensation established by section 22 of the 1947 Act). The

(*a*) In this article, references to sections without further indication are to the sections of the 1954 Act; " the 1947 Act," " the 1953 Act " and " the 1954 Act " mean the Town and Country Planning Acts of those dates.
(*b*) The last date for the submission of claims under the 1947 Act.
(*c*) See definition of the expression " established claim " in s. 1 (3).
(*d*) The famous " Pilgrim " clause.

provisions of the Act dealing with this " share out " of lost development value (incidentally, the £300m. " global sum " is not mentioned in the new Act) may be divided into two—Parts I and V, dealing with *past* transactions, and Part II and III, dealing with the circumstances in the *future* in which an established claim will be capable of being turned into hard cash.

The control of development (Part III of the 1947 Act) is not directly affected by Part I, nor greatly affected by any of the provisions of the new Act, but no doubt the provisions for the review of planning decisions (section 23), and the clause affording a purchaser protection in the case of subsequent compulsory acquisition (section 33), will both have the effect of making the local planning authority think even more carefully than in the past before refusing an application for development.

Part I—Past Transactions

This is the Part which deals with claims for the depreciation in land values as a consequence of the passing of the 1947 Act, and this is the Part which will have been of most direct concern to most conveyancers since the Act came into force on January 1, 1955 (*e*), for applications for payment under this Part have to be lodged, on forms issued by and obtainable from the Central Land Board (hereafter called " the CLB "), on or before April 30, 1955 (*f*).

This Part lists four " Cases "—and three " extras "—describing circumstances in which the " holder of a claim holding " (*g*) may make an application for a payment as above mentioned, to be assessed at the principal amount of the payment (according to the particular Case, etc.), plus interest thereon at 3½ per cent. per annum (simple interest) from July 1, 1948, to the date of payment, or to June 30, 1955 (whichever is the earlier) (*h*). Any sums due by way of unpaid development charge from the claimant in respect of that, or of any other land, may be set off by the CLB against any payment so claimed (*i*); but development charges which had been postponed in accordance with the special arrangements

(*e*) Town and Country Planning Act, 1954 (Appointed Day) Order, 1954 (S.I. 1954, No. 1598/C.17).

(*f*) See s. 13, and the Central Land Board Payments Regulations, 1954 (S.I. 1954, No. 1599). The Central Land Board may, in any particular case, allow an extended, or further extended, period for the making of an application: reg. 3, proviso.

(*g*) A " claim holding " means the benefit of an established claim (s. 2 (1)), and the " holder of a claim holding " is the person for the time being entitled to the holding or, where the holding is subject to a mortgage made otherwise than by assignment, the person who would be so entitled if the holding had not been mortgaged (s. 2 (8)).

(*h*) See s. 14.

(*i*) ss. 14 (2) and 49.

relating to the accommodation of agricultural workers (*k*) are to be treated as having been discharged (*l*).

Before discussing the Cases in detail, the following matters should be explained :

(a) The claim holding may have been " pledged " to the CLB as security for payment of a development charge (see section 2 (2) (a) and Second Schedule). If the pledge was given pursuant to the special arrangements relating to the owners of single house plots (*m*), the claim holding is to be regarded as extinguished in so far as the pledge extended, with reference to the particular parcel of land;

(b) If a payment has become, or becomes, payable in respect of certain war-damaged land under section 59 of the 1947 Act, then that payment will, so far as it extends in respect of the area of the claim holding, have the effect of extinguishing the claim holding (see section 2 (2) (b) and Third Schedule (*n*));

(c) If an established claim has been split up by virtue of the disposition of part of the benefit of a claim (*o*), then each of those different parts must be treated as having constituted a separate claim holding, and the area and value of each such claim holding must be apportioned, normally by the CLB, and provision is made for an appeal to the Lands Tribunal against any such apportionment by any person affected (*p*).

The following are the Cases in which, and *only* in which, a claim for payment of compensation for loss of development value (accrued before July 1, 1948) can be made under Part I :

Case A (sections 3 and 4) : *Where a development charge has been incurred by the claim holder or his predecessor in title*

In order to establish a claim under this Case, it is first essential to be able to prove that a development charge has been " incurred "; *i.e.*, in the first place, the charge must have arisen in respect of land constituting the area of the claim holding, or part of that

(*k*) See Circular 62 of the former Ministry of Town and Country Planning, dated October 20, 1948.

(*l*) s. 49 (5).

(*m*) See, *e.g.*, CLB Press Notices 8 and 8A of October, 1948.

(*n*) And see also s. 57, discussed below under Part VI.

(*o*) No assignment of a claim (or of any part thereof) has any legal effect if made after December 31, 1954, or if it required the consent of the CLB under s. 2 of the 1953 Act and no application for such consent was made before that date, unless the assignment took effect by virtue of a will of a testator dying before January 1, 1955 (see s. 60).

(*p*) ss. 2 (3) and 48 (3). Where there is an appeal to the Lands Tribunal, they must decide whether or not the apportionment was " just and appropriate in all the circumstances."

area, or land which includes that area or part of that area (*q*). Secondly, the CLB must have determined that the charge was payable, and it must have been actually paid, or become immediately payable (*r*). The claimant must be the holder of a claim holding, and he must have himself incurred a development charge, or he must now be entitled to an interest in land in respect of which a development charge was incurred by a person from whom the claimant derives his interest, or whose interest has subsequently become merged in his interest (*s*).

The principal amount of the payment that may be claimed under this Case does not necessarily equal the full nominal value of the claim holding, for the payment is restricted to the amount actually paid (or payable) by way of development charge (plus interest), and it is also restricted to the value of the holding (*t*). Thus, if an established claim was £300, in respect of a parcel of land having an existing use value of £200, and a development charge of £200 in respect of the erection of a house thereon has been paid, it being accepted that the local planning authority could have permitted the fuller development of the site by (*e.g.*) the erection of a shop instead of the house, payment of £200 only of the established claim can now be applied for under Case A. The "unexpended balance of established development value" (*u*) of £100, may be available for claim under some other Part I Case, or for subsequent claim (*a*). If, however, in our example, a development charge of £500 had been incurred in respect of some intensive development, such as the erection of a shop with a number of flats above, then the most that can now be recovered is the principal amount of the claim holding of £300 (plus interest).

Case B (sections 5 and 6): *Acquisition at a price excluding development value*

Under this Case, the holder of a claim holding will be entitled to payment where, at a time when he was entitled (*b*) to *both* the claim holding *and* the interest to which the holding related, that interest was acquired compulsorily, or by a public authority

(*q*) s. 3 (2).

(*r*) s. 4 (1); therefore, if a charge has not become payable (*e.g.*, because payment thereof has been postponed: see s. 49 (5)) no claim can be made hereunder—and if the charge has not been paid it can be set off against the claim: s. 14 (2). (*s*) s. 3 (1).

(*t*) And this means, so far as Part I is concerned, the value of the holding immediately prior to January 1, 1955: s. 2 (5).

(*u*) See explanation of this expression in s. 17, and discussion of Part II, below.

(*a*) *e.g.*, possibly under Part II.

(*b*) "In the same capacity": *e.g.*, it will not therefore be sufficient if the holder is entitled to the claim holding as personal representative and the interest as beneficiary.

having compulsory purchase powers (*c*), or was sold to any other person, in any such case, for a compensation or at a price which fell short of the sum of the value of the holding and the existing use (or restricted) value of that interest. This Case will apply however, only (*d*) if :

(a) in the case of acquisition (compulsory or by agreement) by public authorities, the notice to treat was served or the contract was made on or after August 6, 1947, and before January 1, 1955; *or*

(b) in the case of sales to other persons, if the contract was made on or after August 6, 1947, and before November 18, 1952, or was made in pursuance of an option granted on or after July 1, 1948, and before November 18, 1952; *and*

(c) provided the compensation or price was *not* calculated in accordance with the provisions of Part II of the Town and Country Planning Act, 1944, or on the basis of equivalent reinstatement.

References in this Case to the compensation or price paid must exclude so much thereof as was attributable to disturbance, severance or injurious affection, and existing use value means the amount of compensation (less the items of disturbance, etc.) payable under the Acquisition of Land (Assessment of Compensation) Act, 1919, and sections 51–55 of the 1947 Act (*e*).

The principal amount of the payment that may be claimed under this Case is the value of the holding (as at December 31, 1954), less any amount by which the compensation or sale price exceeded the existing use or restricted value of the interest that was acquired or sold. Thus, if our parcel of land referred to in Case A, above, had been compulsorily acquired, and compensation had been paid in the sum of £400, which included an element of £100 in respect of injurious affection to other land, the amount that could now be claimed under Case B should be calculated as follows :

	£	£
Value of the claim holding		300
Compensation paid	400	
Less Injurious affection	100	
	300	
Less Existing use value	200	100
Amount that can now be claimed		£200 (*plus* interest)

(*c*) An expression which occurs throughout the Act: see definition in s. 69 (1).
(*d*) See s. 5 (3) and (2).
(*e*) See s. 6 (1).

It should be noted that where a payment falls to be made under this Case in respect of an acquisition (compulsory or by agreement) by a public authority having compulsory purchase powers, the CLB may be able to recover the amount of the payment from the authority, under the powers of section 52.

Case C (section 7): *Gifts*

The holder of a claim holding will be entitled to payment under this Case where he has disposed of his interest in the land "otherwise than for valuable consideration (*f*)," and provided that at the time of such disposition he was beneficially entitled both to the interest and to the claim holding, provided also that the gift was made (*g*) on or after July 1, 1948, and before November 18, 1952. In this Case, the principal amount of the payment will be the full value of the claim holding, and interest will be payable in addition.

Case D (section 8): *Purchases*

The holder of a claim holding will be entitled to payment under this Case, if he acquired the claim holding for valuable consideration (*h*) or derives title from a person who so acquired it—pursuant to a transaction completed or a contract of sale made before November 18, 1952, or in exercise of an option granted on or after July 1, 1948, and before November 18, 1952, and exercised before January 1, 1955; provided also that at no time since such acquisition has the same person been entitled in the same capacity to both the claim holding and the interest in the land (*i*).

In this Case also, the principal amount of the payment will be the full value of the claim holding, plus interest. If any payment at all is made under this Case, regardless of the amount, the whole of the claim holding is to be treated as extinguished as at the commencement of the Act (*k*).

(*f*) This expression does not include marriage or a nominal consideration: see definition in s. 69 (1).

(*g*) In the case of a *donatio mortis causa* this would mean, presumably, the date of the delivery of the document evidencing the existence of the claim holding.

(*h*) See note (*f*) above. This Case also does not apply to acquisitions by way of mortgage.

(*i*) These assignments were valid without the approval of the CLB, although their effect was to separate the ownership of the claim from the ownership of the interest in the land, but, to complete the title, any such assignment had to be notified in writing to the CLB, pursuant to s. 64 (2) of the 1947 Act and reg. 7 of the Depreciation of Land Values Regulations, 1948. The need to obtain the prior written approval of the CLB to such an assignment was introduced by s. 2 (2) of the Act of 1953 (operative with effect from November 18, 1952). Now, all assignments are inoperative if made after December 31, 1954: see s. 60.

(*k*) See s. 15 (1), proviso.

Cases A, B and C (section 9): *Assignments*

The holder of a claim holding can also claim payment under Case A, B or C, as the circumstances may otherwise justify, although he may not be able to bring his claim four square within any of those Cases, if he can show that he derives his title to the claim holding from a person who would have been entitled to payment under Case A, B or C (as the case may be), had he continued to be the holder of the claim holding, *and* provided also that:

(a) the claimant acquired the claim holding otherwise than for valuable consideration, or as mortgagee or assignee under an assignment made on or after November 18, 1952, which was approved by the CLB under the 1953 Act; *and*

(b) he had not at any time been entitled in the same capacity to *both* the claim holding *and* the relevant interest in the land; and

(c) he would not be entitled to a payment under Case D.

Cases Analogous to Case B (section 10)

Payment may be claimed under this section if the CLB (or the Lands Tribunal on a reference on appeal to them) are satisfied that the holder of the claim holding was affected by one of the acts or events listed in section 10 (2) and would have been entitled to a payment under Case B, had the interest been compulsorily acquired or sold in comparable circumstances to those by which it was actually affected. These acts and events are the grant of a tenancy, a sale in consideration wholly or in part of a rentcharge, and any case where compensation for requisitioning, or for severance or injurious affection on the compulsory acquisition of some other land, was paid on the basis of the existing use value of the "relevant interest."

Residual Payments (section 11): *Cases analogous to Cases A and B*

Under this section, an application for payment may be made by a person who is *not* the holder of a claim holding (and these are the only circumstances in which some person other than the holder will be entitled to claim payment under Part I). A claimant will be entitled to payment in respect of a claim holding, (A) if he can prove he is entitled to an interest in land which constitutes the area of that claim holding (or part thereof) and has himself incurred a development charge in respect of that land, *or* (B) if he can establish that the interest to which the claim holding related was compulsorily acquired by or sold to a public authority

possessing compulsory purchase powers (*l*), and provided also (in either A or B) that the CLB, or the Lands Tribunal on a reference on appeal to them, are satisfied that, having regard to the circumstances, the applicant would have been entitled to a payment under either Case A or Case B if he had been the holder of the claim holding at all material times.

None the less, payment may be made under this section only where :

(a) the person incurring the development charge (in (A)), or a person from whom he derived title, had previously purchased the interest in the land from the person who was then the holder of the claim holding; *or*

(b) the person incurring the development charge (in (A)) was the tenant under a tenancy created immediately out of the interest of the person who was then the claimant of the claim holding; *or*

(c) the interest acquired (in (B)) had previously been purchased by the applicant, or by a person from whom the applicant derived title, from a person who at that time was the holder of the claim holding;

and, in any such case, provided also that the CLB, or the Lands Tribunal, are satisfied that the consideration for the previous transaction did not wholly exclude the development value of the interest.

A payment may also be claimed under this section if (A) or (B) above is satisfied, *and* if the applicant is entitled to the interest in the land, but *not* to the claim holding, under a will made by a person who died on or after July 1, 1948, and before February 26, 1954, and also was immediately before his death the holder of the claim holding and also entitled to the interest in the land.

The principal amount of the payment that may be made under this section is to be such amount as the CLB, or the Lands Tribunal, may determine to be appropriate, *less* any payment falling to be made in respect of that claim holding under Case A, B, C or D, or under section 10. Interest will also be payable in accordance with section 14 (1).

General Provisions relating to Part I

By way of an obvious safeguard, section 12 provides that where two or more payments are payable in respect of the same claim holding, by virtue of the various provisions of Part I, the total

(*l*) See definition in s. 69 (1), and Case B, above.

amount of such payments (*m*) may not exceed the total value of the claim holding (as at December 31, 1954 (*n*)). Further, under section 15, if the payment (*m*) is not less than the value of the claim holding, the holding is to be treated as being extinguished as at December 31, 1954; but if the payment (*m*) is *less* than the value of the holding, then the value of the holding as at that date is to be deemed to have been reduced by that amount (*o*).

When application is made for a payment under Part I in accordance with section 13, the application has to be determined by the CLB (who are responsible for the payment of the compensation), or by the Lands Tribunal on a reference on appeal to them by any person who wishes to dispute the findings of the CLB, or by any person who is substantially affected by an apportionment. Any such reference may be initiated by a notice in writing (*p*). This procedure of references from a decision of the CLB to the Lands Tribunal is a noticeable feature of Part I, and they may arise in connection with the following matters:

(i) apportionments (sections 2 (3) and 13);

(ii) reduction or disallowance of a payment under Case A, where compensation has become payable under section 22 of the 1947 Act, or where the compensation or sale price on an acquisition has been increased by calculation on the basis of the exclusion of section 51 (4) of the 1947 Act (section 3 (5));

(iii) a deduction in the development value may be made under Case B, in circumstances where section 61 (6) of the 1947 Act would have applied (section 6 (3));

(iv) the value of the claim holding may be reduced under Case B in circumstances where the restricted value of the interest would have been a minus value—which reduction the CLB (or the Lands Tribunal) may waive "if they think it just and proper so to do" (section 6 (4), and proviso);

(v) similar circumstances may arise under Case C to those described under (iv) above (section 7 (5), and proviso);

(vi) a decision may have to be made whether the case is

(*m*) In all instances under s. 12 or 15, references are to the principal amount of the payment, and the interest element is to be ignored.

(*n*) See s. 2 (5).

(*o*) Except in the case of payments under Case D: s. 15 (1).

(*p*) Central Land Board Payments Regulations, 1954 (S.I. 1954, No. 1599), which also prescribe details of the procedure to be followed before the Tribunal, although in other respects presumably the Lands Tribunal Rules, 1949 (as amended) will apply.

sufficiently " analogous " to Case B to be dealt with under section 10 (section 10 (1) and (5));

(vii) a decision may also have to be made whether the case falls within section 11 (see section 11 (1), (2), (5) and (6)).

If after all this procedure has been followed, and all the exceptions and " ifs and buts " have been surmounted, a payment is eventually made under Part I, any unexpended balance of the claim holding can then be used as the basis of a claim under Parts II, III or V, in Part V (which also deals with *past* transactions) being known as " the relevant holding," and in Parts II and III, being known as the " unexpended balance of established development value " (*q*).

Part II—Compensation in Respect of Future Planning Decisions

It must first be emphasised that there are three essential prerequisites to any claim for compensation under Part II :

(a) a planning decision (*r*) made on or after January 1, 1955;

(b) the land to which the decision relates must have an unexpended balance of established development value (*s*), which must of course also mean that there must have been originally an established claim in respect of that land, and the whole of that claim must not have been extinguished by a payment under Part I; and

(c) the claimant to compensation must be entitled to an interest in the land to which the planning decision relates (*t*).

The operative section of the Part appears at first sight to be section 19, in that this is the section which provides for the payment of compensation in respect of planning decisions, but the effect of the section is immediately qualified and whittled down (to, it is submitted, very little) by the sections that follow, which provide that compensation shall *not* be paid in respect of a large variety of classes of planning decisions. Thus, compensation under this Part will not be payable in respect of a planning decision of any of the following types :

(i) refusal of permission for the making of a material change in the use of buildings or land (*u*);

(*q*) See definition of this terrifying expression in s. 17 (1).

(*r*) *i.e.*, a decision under Part III of the 1947 Act, including one deemed to have been made by virtue of s. 77 or s. 78 of that Act: see s. 16 (4) of the 1954 Act.

(*s*) See s. 17.

(*t*) s. 18; the applicant for planning permission under Part III of the 1947 Act need not have any interest in the land to which the application relates: *Hanily* v. *Minister of Local Government and Planning* [1952] 1 All E.R. 1293.

(*u*) s. 20 (1) (a).

(ii) a decision on advertisement control (*a*);

(iii) conditions (*b*) relating to the number or disposition of buildings, the dimensions, design, structure or external appearance of any building or of the materials used, the manner in which any land is to be laid out, including provision of facilities for parking, unloading or fuelling of vehicles (*c*), the use of any buildings or other land, the location or design of any means of access to a highway (*d*), or the materials to be used, or any condition in a permission granted for the winning or working of minerals;

(iv) refusal of permission, where the reason (or one of the reasons) given is that the development would be premature, by reference to the order of priority in the development plan (*e*), or by reason of an existing deficiency in water supplies or sewerage services (*f*);

(v) refusal of permission, where the reason (or one of the reasons) given is that the land is unsuitable for development on account of its liability to flooding or subsidence (*g*);

(vi) *any* planning decision, where there is available with respect to that land some other planning permission for development of a residential, commercial or industrial character (*h*);

(vii) *any* planning decision, where the claimant is entitled to compensation under section 22 of the 1947 Act by virtue of that decision (*i*).

Compensation under Part II is payable not by the local planning authority, but by the Minister (of Housing and Local Government), but the claim must be made in the form scheduled to the Town and Country Planning (Compensation) Regulations, 1954 (*k*) and must be sent to the local planning authority within six months from the date of the planning decision to which it relates (*l*). The

(*a*) *i.e.*, either a refusal or a conditional permission given under the Control of Advertisements Regulations made under s. 31 of the 1947 Act.

(*b*) See s. 20 (2).

(*c*) This would include a condition requiring the provision of a service road or lay-by.

(*d*) But *not* to a service road: s. 20 (7).

(*e*) Programme maps are required to be included in development plans by reg. 12 of the Town and Country Planning (Development Plans) Regulations, 1948 (S.I. 1948, No. 1767, as amended by S.I. 1954, No. 933).

(*f*) s. 20 (3).

(*g*) s. 20 (4).

(*h*) Including warehouses: s. 21 (3).

(*i*) See s. 19 (5), and note also the other special cases provided for in s. 19.

(*k*) S.I. 1954, No. 1600.

(*l*) s. 22; the period may be extended or further extended by the Minister in any particular case, either before, on or after, the date on which the normal time for lodging claims would have expired.

planning authority must then transmit the claim to the Minister in manner provided by the Regulations, and the Minister may, instead of allowing the claim forthwith, review the planning decision to which it relates, and grant the original application for planning permission (in the case of a refusal), discharge some or all of any conditions imposed by the decision, or impose less stringent conditions, or grant planning permission for some development other than that for which application was originally made (*m*).

If the Minister decides so to review the planning decision, he must notify the local planning authority and the claimant, and they must be given an opportunity of a hearing before a person appointed by the Minister, before he makes his final decision (*n*).

The amount of compensation that may be paid under this Part is in no circumstances to exceed the unexpended balance of established development value, and is to be computed by reference to the amount by which the interest of the claimant in the land has been depreciated as a consequence of the planning decision (*o*); this has to be assessed as the difference between the value of the land if permission had been granted for the development desired, subject only to those conditions of the types referred to in section 20 (2) (*p*), which might reasonably have been imposed in the particular case, *and* the value of the land as affected by the planning decision (including, of course, any supplementary decision made by the Minister on a review), assuming that only development of a class within the Third Schedule to the 1947 Act would be permitted to take place on that land; allowance must also be made, however, for any previous planning decisions for which compensation has become payable, and also any other grant of planning permission or undertaking to grant permission (*q*).

The Minister himself must determine any claim for compensation, and must notify his findings on the claim to the claimant, and also to any other person who has claimed Part II compensation in respect of the same land; if the claimant or other person wishes to dispute the Minister's findings, he may refer the findings to the Lands Tribunal (see the Town and Country Planning (Compensation) Regulations, 1954, regs. 7 and 8).

Where compensation has been determined under this Part at a sum in excess of £20, the Minister must (if practicable) apportion the sum between the different parts of the land to which the claim

(*m*) s. 23.
(*n*) s. 24 (1).
(*o*) s. 25.
(*p*) See above—planning conditions of a type referred to in para. (iii) above.
(*q*) s. 26.

relates and, more important, he must also give notice of the compensation paid to the local county borough or county district council. The notice so given is registrable in the local land charges register for the district (*r*), and it then operates as a stopper on any subsequent development on the land of a residential, commercial or industrial character (*s*), or which consists of the winning or working of minerals, or of any type to which in the particular case the Minister considers it reasonable that the section should apply (*t*). In such cases, no development of the specified classes may be undertaken on the land until the amount specified has been paid or secured to the satisfaction of the Minister. This amount will in normal cases equal the whole of the compensation originally paid (no interest thereon will be exacted), but the Minister may remit the whole or any part of the amount, and no such compensation will be recoverable under this section where a sum has already been recovered from a local or other public authority under section 52 of the Act (*u*).

The planners have made much of Part II of the Act, suggesting that the introduction of the principle of paying compensation for unpalatable planning decisions amounts to a reversion to the unpopular (to planning authorities) betterment provisions of the Town and Country Planning Act, 1932. In so concentrating publicity on these clauses, they may have done their own cause harm, as the result may be that the lay members of local planning authorities will be reluctant to refuse permission, or to impose conditions, even where sound planning reasons would justify such action. We feel that this distaste for Part II has been unnecessarily exaggerated, as the whole scheme of payment of compensation under this Part is contingent on there being an unexpended balance of established development value in respect of the land; and even where an established claim may have originally existed, in a large number of cases the claim will have been extinguished as a consequence of a payment under Part I. Similarly, we would submit that the provisions for repayment of the compensation paid, if permission for development of a remunerative type is subsequently granted, are fair and reasonable, the position of a subsequent purchaser being safeguarded by the requirement of registration. Presumably cases where liability to repayment arises

(*r*) In Part III of the register; see s. 28 (5) and Local Land Charges (Amendment) Rules, 1954, S.I. 1954, No. 1677.

(*s*) See s. 21 (3).

(*t*) The Minister here seems to have an absolute discretion which cannot be called into question, either in the Lands Tribunal or in the "ordinary" courts; but he must have regard to "the probable value of the development."

(*u*) See s. 29 (7).

will be picked up by local planning authorities; it will be necessary for them to keep some sort of record of cases where compensation has been paid (*a*) in order that the Minister may be informed of any such case where a subsequent planning permission of the appropriate type is granted (*b*).

Part III—Compensation for Compulsory Acquisition

In any case of compulsory acquisition of land by a local or other public authority, where the notice to treat is served after December 31, 1954, compensation (to be claimed in the ordinary manner) will be payable on the basis of the existing use value of the land, *plus* the unexpended balance of established development value in respect of that land, subject to the following:

(a) special adjustments where the interest acquired is subject to a rentcharge (*c*);

(b) existing use value only will be taken into account if the interest acquired is a tenancy granted on terms prohibiting the carrying out of any new development (*d*) on the land;

(c) additional compensation will also be payable in certain specified cases where buildings have been erected or work carried out (on the land acquired, or on some other land) on or after July 1, 1948, in accordance with some existing planning permission (*e*);

(d) the value of the interest acquired is to be assessed having regard to any planning permission previously granted (*f*) in cases where the land is "dead ripe" (*g*), where the planning permission was deemed to have been granted under section 78 of the 1947 Act (*h*) or where the land is within one of the classes specified in the Sixth Schedule to the new Act (*i*) (see section 34);

(*a*) Either under this Part, or under the other sections of the Act where compensation is similarly recoverable (see s. 41—Part IV—s. 46 (4)—Part V—and ss. 57 and 59 of 1947 Act).

(*b*) The Minister can then, if there is an infringement of s. 29, serve a notice under s. 29 (8) and recover the payment; it will be noted that there is no provision for penalties, as was the case in connection with development charges under s. 74 of the 1947 Act.

(*c*) See s. 31 (1) and Fifth Schedule.

(*d*) This does not include any development within the Third Schedule of the 1947 Act: see definition of "new development" in s. 16 (5).

(*e*) See s. 32.

(*f*) Notwithstanding the provisions of s. 51 (4) of the 1947 Act.

(*g*) A certificate having been given under s. 80 of the 1947 Act.

(*h*) Buildings that were unfinished on the coming into operation of the 1947 Act.

(*i*) Local authority land, land belonging to New Town Development Corporations, etc.

(e) even if there were no established claim in respect of the land, an additional payment may be added to the "existing use value" compensation, on the certificate of the Treasury, if it appears that had a claim on the £300m. global fund been made in due time, it would have been established (*k*);

(f) compensation for severance, injurious affection and disturbance will be paid subject to the special provisions of section 36 (*l*);

(g) a compulsory acquisition or a sale by agreement to a public authority possessing compulsory purchase powers (*m*) has the effect of extinguishing the unexpended balance of established development value, except in so far as some other person may retain an interest in that land or in some part thereof (*n*).

A new principle is introduced by section 33, which will go some way in freeing land frozen by "paper planning"—land which has become unsaleable because some local or other public authority have said they may need to acquire it for some specified (or even unspecified) purpose at some time—no doubt also unspecified—in the future. Under this section, a prospective purchaser of land, or some other applicant, may inquire of the local county borough or county district council whether the council themselves propose to acquire any interest in the land within the next five years, and whether they have been advised by any public authority possessing compulsory purchase powers that they propose so to acquire such an interest. If the answer to such an inquiry is in the negative, and the applicant either contracts to purchase, or completes the purchase of, the land affected within three months of the service of the notice on him by the council (*o*), then any planning permission in force at the date of the service of such notice is to be taken into account (*p*) in assessing the compensation payable on any compulsory acquisition of that land taking place within a period of five years. A fee of five shillings will be payable to the local authority on any application for information under this section.

(*k*) See s. 35; presumably the claimant will have to prove that the circumstances exist entitling him to a payment under this section, and then obtain the necessary certificate.

(*l*) This is a highly complicated section, and has an almost complete vocabulary of its own.

(*m*) See definition in s. 69 (1).

(*n*) See s. 37.

(*o*) Notice of the contract or completion has to be given to the council concerned.

(*p*) Notwithstanding the provisions of s. 51 (4) of the 1947 Act.

PART IV—COMPENSATION FOR (FUTURE) CASES OF REVOCATION OR MODIFICATION OF PLANNING PERMISSION

This Part of the Act applies only to orders made under section 21 of the 1947 Act, and amends the provisions for compensation payable in such cases under section 22, *ibid.*, the amounts payable under this Part being in no way dependent on there being any established claim or any unexpended balance of established development value in respect of the land. The provisions of sections 21 and 22 of the 1947 Act are not fundamentally altered, but sections 38 and 39 provide that in the case of any orders made after December 31, 1954:

(a) payment of compensation for depreciation in value of the interest occasioned by the making of the order shall be made in respect of any loss of value, whether this occurs before or after 1948;

(b) where the compensation paid exceeds the sum of £20, it must be apportioned, notice thereof must be registered in the local land charges register, and it may be recoverable in the event of planning permission being given subsequently for certain types of development (*q*).

Section 40 provides for adjustments to be made in these cases as between the Minister and the local planning authority (on whom falls the liability to pay compensation under this Part) where the land has an unexpended balance of established development value, but this will not affect the claimant of the compensation—except in those cases where he may wish to claim compensation under some other Part of the Act, as compensation paid under Part IV would then be taken into account.

PART V—COMPENSATION FOR PAST PLANNING DECISIONS

In order that compensation may be payable under this Part, there must be an established claim, and the claimant must be the holder of a claim holding (*r*) and the Part applies only to planning decisions (*s*) and orders under section 21 of the 1947 Act, made prior to January 1, 1955 (*t*). Further, the claimant must be entitled to an interest in land which at the time of the planning decision (or section 21 order) was the whole or part of the area of a claim holding, or else he must have been entitled to such an interest and sold

(*q*) The relevant provisions of part II (ss. 27–29) are applied for this purpose: see ss. 39 and 41.

(*r*) If payment in full has been made under Part I, this will have been extinguished.

(*s*) See definition in s. 16 (4).

(*t*) See s. 42.

it pursuant to a contract made between November 18, 1952, and January 1, 1955; he must also be able to prove that his interest has been depreciated in value as a consequence of the decision or order (*u*). No compensation will be payable in respect of those types of planning decision for which payment of Part II compensation is excluded (*a*).

Claims for compensation must be lodged with the local planning authority (*b*) and determined by the Minister in the manner applicable to claims under Part II. The Minister has the powers given under Part II to review planning decisions, and also the provisions as to the registration of compensation notices and the recovery of compensation paid in certain circumstances apply equally to this Part. Any planning permission or undertaking to grant permission made subsequent to the original decision must be taken into consideration in assessing the compensation payable (*c*).

The amount of the compensation that may be claimed under this Part will be the amount of the depreciation in value of the interest in the land concerned, plus interest thereon at $3\frac{1}{2}$ per cent. per annum, from July 1, 1948, to the date of payment, or to June 30, 1955, whichever is the earlier (*d*).

PART VI—Miscellaneous Provisions

The provisions of this Part are not all machinery; although a number of the sections are concerned with such mundane matters as definitions (section 69), repeals (section 71), consequential adaptations of the 1947 Act (sections 67 and 71 and Seventh Schedule), and commencement, etc. (section 72), a number of quite important substantive provisions are included in this Part. These may be summarised as follows:

(a) *Information.* Under section 48, information may be obtained, on payment of a fee of 5s. or £1 according to the nature of the information (*e*) from the CLB in the prescribed form, whether or not any land has an unexpended balance of established development value.

(*u*) s. 43.
(*a*) s. 43 (4), applying s. 20.
(*b*) On the form scheduled to the Town and Country Planning (Compensation) Regulations, 1954 (S.I. 1954, No. 1600), by not later than June 30, 1955: see s. 45 (1), proviso, applying s. 22 (2).
(*c*) s. 43 (5).
(*d*) s. 46 (1).
(*e*) By any person—not necessarily only those persons who have an interest in the land concerned. The normal fee is 5s. and the higher fee of £1 will be exacted only where the application involves a new apportionment: s. 48 (8). The forms of application and the certificates are prescribed by the Central Land Board (Provision of Information) Regulations, 1954 (S.I. 1954, No. 1720).

(b) *Local and public authorities.* Sections 50 and 51 prescribe a new procedure for payment of exchequer grants to local planning authorities, in respect of financial years commencing after March 31, 1955. Section 52 enables the CLB to recover from a public authority possessing compulsory purchase powers, who have acquired land in certain circumstances, any payment that the CLB has had to make in respect thereof under Part I of the Act.

(c) *Special types of land.* Section 53 amends the law relating to compensation for damage to requisitioned land, where such compensation accrues due after December 31, 1954 (*f*), section 54 deals with minerals (*ff*), section 55 with certain mining leases, and section 56 with contributions to the Ironstone Restoration Fund (*g*). Where a payment has been made in respect of war-damaged land under section 59 of the 1947 Act, and that payment exceeds £20, a notice of that fact may be registered in the local land charges register, and the payment will then become recoverable in circumstances similar to those applicable to compensation recoverable under section 29 of the 1954 Act (*h*). Section 58 applies the general principles of the Act to monopoly values of premises licensed under the Licensing (Consolidation) Act, 1910. Where a claim holding is subject to a mortgage or an interest in land is subject to a mortgage, a rentcharge or the trusts of a settlement, the rights of the various parties to claim under Parts I, II and V are regulated by the Town and Country Planning (Mortgages, Rentcharges, etc.) Regulations, 1955 (*hh*).

(d) *Control of development.* There are two main provisions in Part VI which affect the administration of Part III of the 1947 Act, although, apart from these, the new Act is not really concerned with this major branch of planning law. These are:—

(i) Section 59 deals with applications for industrial development, which under section 14 (4) of the 1947 Act require a certificate of the Board of Trade. In these cases in future the local planning authority are required to notify the applicant if they are of the opinion that they would have refused the application for development whether or not the Board of Trade had eventually granted a certificate.

(*f*) This section does not really deal directly with planning law, being concerned to amend the Compensation (Defence) Act, 1939, and the Requisitioned Land and War Works Act, 1948, so that persons entitled to compensation thereunder shall in effect have similar benefits to those given by Part III for compulsory purchase.

(*ff*) And see the Town and Country Planning (Minerals) Regulations, 1954 (S.I. 1954, No. 1706).

(*g*) See Mineral Workings Act, 1951.

(*h*) s. 57.

(*hh*) S.I. 1955, No. 38.

On receipt of such a notice, the applicant will then be able to follow the procedure of section 19 of the 1947 Act (service of a purchase notice), if he so desires; apart from this provision the refusal by the Board of Trade to grant a certificate did not permit of section 19 being invoked.

(ii) Section 70 (*i*) amends section 19 of the 1947 Act, by providing that when considering whether a purchase notice should be confirmed by reason that the use of land in any particular state would or would not be reasonably beneficial, the Minister must not in future take account of the possibility of any development taking place on the land of any class other than those specified in the Third Schedule to the 1947 Act. This section is, perhaps, more by way of clarification than amendment of the law, but it is none the less important, in view of the use made of purchase notice procedure in practice. In future, these may be expected more often—certainly whenever a landowner loses a sale by reason of an affirmative answer being given on an inquiry under section 33.

Practical Points

We summarise briefly a few practical points that we would suggest for the consideration of conveyancers:—

(a) A review of cases where land has an established claim should be undertaken by the responsible advisers of landowners concerned, well before April 30, 1955, to ascertain whether claims for payment can be lodged under one or other of the headings of Part I; the position under Part V should be similarly investigated at the same time, but here a longer period of grace is allowed (until June 30, 1955).

(b) Prospective purchasers of land having any intention of developing the property should, as a matter of course, obtain planning permission for the proposed development, before contract, and they should also at as early a stage as possible request the information referred to in section 33.

(c) If a prospective purchaser of land finds a compensation notice registered against the property in the local land charges register, he should inquire fully into the case, and consider whether, having regard to any intentions he may have for development, or any potentialities of the property, it seems probable that any actual liability to repayment will arise.

(*i*) This section is somewhat strangely placed—between the interpretation section and the section incorporating the list of repeals—and should not be overlooked.

(d) Where an intending developer is refused permission to develop by the local planning authority, and his land has an unexpended balance of established development value, it may be more worth his while to claim compensation under Part II rather than serve a purchase notice (*k*) under section 19 of the 1947 Act—it is suggested that the relative merits of the two courses should be carefully considered in such a case.

(e) Purchasers should not now agree to acquire land at a price expressed to include any balance of development value, unless it seems probable that a claim for compensation may arise under Parts II, III or IV—a highly speculative matter. Claims under those Parts may be submitted by persons other than the holder of a claim holding, but in the case of Part I (or Part V) claims, these cannot be bought after December 31, 1954, as all assignments after that date will be inoperative (*l*), and in so far as there is any " unexpended balance of established development value," this will automatically run with the land without express mention.

(f) In the case of practitioners acting for charities, and where a direction has been given under section 85 of the 1947 Act to the effect that the particular parcel should be treated as land to which that section applied, consideration should be given to the desirability of applying for a revocation of the direction (*m*).

(*k*) Compensation would, of course, be payable in accordance with Part III of the 1954 Act on any acquisition consequent on the service and confirmation of such a notice.

(*l*) See s. 60.

(*m*) See First Schedule, para. 12; such an application must be made to the Minister before July 1, 1955.

THE FINANCE OF OVERSEAS SALES

(An introduction with special reference to documentary letters of credit.)

By David Smout, Barrister-at-Law

The Traditional Bill of Exchange

There is no easy method of financing the sale of goods for export which does not put one or the other of the parties to the contract of sale at a considerable disadvantage. With the decline in the seller's market it is not now often to be expected that the overseas buyer will himself be ready to pay cash at the time of the order or even at the time the goods are dispatched from this country. Even if he has no need to depend upon his dealings with the goods to finance the purchase, he will ordinarily be reluctant to tie up much of his own capital during the period of manufacture or of shipment. On the other hand the seller, unless dealing with an affiliated company, will not often be agreeable to await payment until the goods have arrived at their ultimate destination. Even if he does not need the purchase price to finance the manufacture he will ordinarily be unwilling to remain long out of funds and may well be appalled at the prospect of disposing of the goods in a distant country should the buyer there reject them or fall insolvent.

Use of the documentary bill of exchange tends to reduce some of the extreme hardships resulting either from payment in advance or from shipment on open account, and enables the remaining disadvantages to be shared more equitably between the parties (*a*). The practice is for the seller on dispatching the goods to draw in his own favour upon the buyer for the price. The bill of exchange together with the shipping documents (*b*) is then forwarded by air mail to a local agent in the buyer's country who then presents the bill of exchange to the buyer. If the bill is payable at sight and is so paid the shipping documents are thereupon surrendered. If the bill is payable in the future the shipping documents will

(*a*) See generally, Schmitthoff, *The Export Trade* (2nd ed. 1950); Syrett, *The Finance of Foreign Trade* (2nd ed.).

(*b*) Under a C. I. F. contract those usually required are a clean bill of lading, a marine insurance policy or certificate of insurance, and a commercial invoice. On occasions a Consular invoice, or certificate of origin, of value or of weight may also be specified as necessary. Exports to South American countries in particular call for meticulous care in the preparation of documents.

be surrendered either upon acceptance (and thus be marked D/A) or on ultimate payment (D/P) as the seller and the buyer may have agreed in the contract of sale; the bill after acceptance is returned to the seller who may be content to await payment until the bill falls due, but more probably will seek to realise its value before maturity by transferring the entire property in it or obtaining an advance on it from a third party.

Sometimes a seller is so ill-advised as to dispense with an agent and to forward the bill of exchange with the shipping documents direct to the overseas buyer. In these circumstances the buyer is said to be under a duty " to approbate or to reprobate entirely and completely " (*c*) and if he does not accept or pay the bill of exchange he must return the shipping documents (*d*). As between the parties if he wrongfully retains the shipping documents the property in the goods does not pass to him, but he is nevertheless in the position of a mercantile agent and in consequence able to give a good title under section 25 (2) of the Sale of Goods Act, 1893, to a subsequent purchaser or pledgee taking in good faith and without notice (*e*).

Usually, however, the seller arranges for presentment of a documentary bill to be made through normal banking channels. He sends it to his own banker who, as agent for collection, will require detailed instructions not only as to presentment of the bill, surrender of the shipping documents and the mode in which the proceeds are to be remitted, but also as to the action to be taken in the event of dishonour. The banker will in turn instruct an overseas branch or foreign correspondent.

The banker who receives a bill merely for collection is not as such a transferee for value. His lien may be applicable but he cannot otherwise be said to hold it in his own right. Where however the seller is unwilling to wait until the proceeds are ultimately remitted there is a variety of courses open to him. He may pledge both the bill and the shipping documents with his banker receiving an advance proportionate to his banker's assessment of the financial stability of both parties to the original contract of sale. Regard will be had to the date on which the bill is to mature and the seller who wishes to obtain a substantial advance may be required to provide collateral security. In some cases the banker in extending credit facilities to the seller may agree to accept bills drawn on himself by the seller (being in value

(*c*) *Shepherd* v. *Harrison* (1871) L.R. 5 H.L. 116, at p. 133, *per* Lord Cairns.
(*d*) Sale of Goods Act, 1893, s. 19 (3).
(*e*) *Cahn* v. *Pockett's Bristol Channel Co.* [1899] 1 Q.B. 643.

a percentage of the documentary bills tendered from time to time) and these as bank bills may be discounted at the finest market rate. Alternatively the seller may, after a documentary bill has been accepted by the buyer, transfer the entire property in the bill to the banker. A distinction is made in some banking circles between purchase and negotiation (*f*). If the bill is one which bears on its face a clause providing that the buyer as drawee shall pay interest from the date thereof until the remittance is received in the United Kingdom then the banker to whom it is transferred is said to have acquired it by purchase. Where however there is no such clause the banker's title will have been acquired by the seller negotiating or discounting the bill to him and it is then the seller who is responsible for the payment of interest. In either case, however, the banker obtains the entire property in the bill and will look for payment of its face value first from the buyer as drawee, or, if it be dishonoured, then to the seller as drawer or endorser.

Drawbacks

A multitude of patterns may be woven around the documentary bill, and a particular pattern may be chosen to suit particular circumstances. In every case it is at least a safeguard against a measure of commercial dishonesty. The buyer does not pay until he has the shipping documents, and their possession need not be surrendered until the seller's agent has been paid or the bill of exchange accepted. Nevertheless the limitations of the documentary bill are readily apparent. Where the bill is payable at sight or where payable in the future on D/P terms the buyer must still find the purchase price before resorting to the goods. Nor is the seller altogether content; at the time of shipment he has no certainty of payment, and, should the buyer thereafter default, the seller has the disagreeable task of looking elsewhere for potential purchasers for goods that may be thousands of miles from the United Kingdom. His difficulties are aggravated if the goods be perishable or the market precarious. A buyer who must depend on a subsale to put him in funds before paying the purchase price to the seller will wish for D/A terms to be incorporated in the contract of sale. These however will deprive the seller, after the bill has been accepted, of his property in the goods. He will be left with merely his personal remedy, more easily enforced on an accepted bill of exchange than under a contract of sale, but of little value if the buyer falls insolvent.

(*f*) See "The Finance of Exports," by "Merchant Banker" in the *Exporters' Year Book*, 1954, p. 41.

Insurance with Export Credit Guarantee Department

Fortunately the seller may reduce his difficulties and mitigate his loss by insurance with the Export Credit Guarantee Department (*g*). In the last three years this Department, an off-shoot of the Board of Trade, has insured over £500 millions worth of goods for export annually (*h*). Although its interests are varied (*i*) the Department does not seek to provide cover for marine risks or other hazards normally insurable through commercial agencies, but rather in the main to give protection against non-payment of the purchase price. Both the standard short-term Contracts and Shipments Policies, there made available, cover such specific risks as that of the insolvency of the buyer or his failure to pay within twelve months of due date, of exchange restrictions preventing transfer of sterling, of the occurrence of war or revolution in the buyer's country, of the incurring of irrecoverable additional delivery charges caused by diversion during shipment, and that of the cancellation or non-renewal of an export licence. The Contracts Policy provides cover from the date of contract and is in particular demand where goods have to be manufactured for a specialised market and cannot easily be disposed of elsewhere. The Shipments Policy, although it covers the same risks, is effective from the date of shipment only and is more suitable for standardised products where the Contracts Policy is not needed, for if difficulties arise before shipment these products can be diverted to local markets. The Department is run on commercial lines and is not to be thought of as subsidising the export trade; nevertheless it does not seek to make profits, and moderate premiums are payable which are separately assessed for each country. In order to provide an adequate spread of risk a seller who wishes to make use of a standard policy is ordinarily required to insure his entire export turnover, although certain markets may be excluded in special circumstances.

Neither the Contract nor the Shipment Policies provide complete protection. Policy holders will recover up to 85 per cent. of any loss due to the buyer's insolvency or his failure to pay within twelve months of due date, and up to 90 per cent. in the other specified cases. The cover does not extend to any loss due to

(*g*) Its powers are derived from the Export Guarantee Acts, 1949 to 1952.

(*h*) Last year the total value of all exports and re-exports from this country approached £2,700 million, but a considerable percentage of this figure must relate to transactions between affiliated companies.

(*i*) These include special Dollar-Drive Policies, covering a percentage of losses resulting from the cost of advertising and of stockholding, and also Joint Venture Policies reducing the capital risk involved in the promotion of sales or the production of goods for the dollar area.

repudiation of the contract by the buyer nor to that resulting from causes within the control of either party (*e.g.*, the failure of the buyer to comply with import regulations), nor to any loss on sales made in foreign currencies due to fluctuation in exchange. Thus, although these policies have done much to strengthen the confidence of merchants in the part which the documentary bill is still capable of playing in international trade, a formidable element of risk nevertheless remains.

Letter of Credit

It will have been seen that it is upon the initiative of the seller that the documentary bill becomes an instrument of finance. He must bargain with his banker as best he can (and is, of course, in a much more favourable position if he has insured against the risk of non-payment) in order that the capital may be provided to him which the buyer is unwilling immediately to afford. Lord Chorley forcefully points out that the fundamental weakness of this method of financing export sales is revealed where D/A terms are applicable. The seller's banker there loses control of the documents at a comparatively early stage and in the event of insolvency of both buyer and seller cannot recoup his losses by realisation of the goods. "It is more satisfactory that the credit should be advanced to the buyer rather than the seller, for the buyer's banker will be in a position to control the documents at much later stages in the transaction. Hence the modern form of documentary credit" (*k*).

The modern documentary letter of credit, also known as the bankers' commercial credit, makes good—at a price—the deficiencies found in the use of the documentary bill (*l*). The machinery is both delicate and complex; it reduces the inherent risks of an export transaction to the minimum and resolves the conflicting interests of seller and buyer as satisfactorily as human ingenuity will allow. It does so by interposing between the seller and the buyer before the date of shipment at least one other party, invariably a banker, of unquestioned solvency and international repute.

The letter of credit is initiated pursuant to the contract of sale on the application of the buyer to his own banker in his own country. Where that banker is satisfied with the financial standing

(*k*) Chorley, *Law of Banking* (3rd ed. 1950), p. 215.

(*l*) As to letters of credit generally, see Gutteridge, *The Law of Bankers' Commercial Credits* (1932); Chorley, *loc cit.*, pp. 214–225; Schmitthoff, *loc. cit.*, pp. 145–156; Megrah, *Documentary Credits—Some Aspects of Law and Practice* (being the Gilbart Lectures on Banking, 1951); Davis, *The Law relating to Commercial Letters of Credit* (2nd ed. 1954).

of the buyer and assured of adequate protection he will in return for an agreed commission issue a letter of credit in favour of a named beneficiary, ordinarily the seller. The letter of credit is no more than an undertaking to the beneficiary that the issuing banker will honour bills of exchange drawn thereunder if accompanied by the shipping documents as specified. On receiving notification of the opening of the credit, then, if it be irrevocable, the seller can proceed to manufacture confident that if he fulfils his obligations he will necessarily be paid. When shipment has been made he will then draw his bill of exchange under the credit and this if not immediately payable can be readily discounted. The issuing banker to whom the shipping documents are delivered on presentment of the bill, has control of the goods throughout all subsequent stages of the transaction, and will not part with that control to the buyer unless reimbursed or at least well content with the strength of any collateral security that the buyer may make available.

Revocable Letter of Credit

The diversities of commerce have led to several variations on this theme. The least commended but also the least expensive letter of credit is that which is revocable. It is rarely used unless standardised products are to be exported to a buyer in whom the seller has a high degree of confidence. It entitles the banker on the instructions of the buyer, and without any need to forewarn the seller, to revoke the credit at any time, although the buyer must honour bills of exchange which the banker may have already accepted or met on his behalf. Such a credit is of little value. Unless the seller, as Dr. Schmitthoff has advised (*m*), insists on a notice clause being inserted in the letter of credit, he has not even a right of action against a banker who, despite prior knowledge, negligently waits until after shipment has been made before informing him of the cancellation (*n*).

Confirmed Letter of Credit

It is commonly stipulated in the contract of sale that the buyer should require his own banker to arrange for the credit to be issued through another banker situate in the country of the seller. Accordingly in the great majority of letter of credit transactions there are not one but two bankers interposed between the contracting parties—the issuing banker in the one country and the correspondent banker in the other. The correspondent banker

(*m*) Schmitthoff, *loc. cit.*, p. 150.
(*n*) *Cape Asbestos Co., Ltd.* v. *Lloyds Bank* [1921] W.N. 274.

merely advises the seller of the letter of credit and disclaims personal responsibility or he may himself undertake to meet the obligations set out therein. In the latter event the credit being reinforced by the correspondent banker is said to be confirmed.

A revocable credit is unlikely to be deliberately confirmed, for no correspondent banker will wish to hold himself out as liable to the seller unless assured of being indemnified by the issuing banker. Doubtless as a matter of practice a confirmed credit may be taken to be irrevocable, though the terms are not interchangeable, for an irrevocable credit is not invariably confirmed.

Whichever of these forms the letter of credit may take, it will specifically indicate the manner in which the bill is to be drawn and the method by which it is to be met by either the issuing or correspondent banker as the case may be. The undertaking of the appropriate banker may be merely to negotiate a bill drawn by the seller on the buyer, and, although negotiation will provide the seller with immediate funds, it will not free him of that secondary liability attaching to a drawer or endorser should the bill later be dishonoured. The seller is the better protected if, as is more usual, the credit authorises him to draw on the appropriate banker, for he is then assured, if the shipping documents are in order, of either direct payment or ready discount without in either case subsequent obligation. If the so-called "red letter clause" is embodied in the credit the seller may obtain an advance on the purchase price before shipment (*e.g.*, for the purpose of enabling the goods to be packed) on condition that he surrenders a receipt from a forwarding agent or warehouseman indicating that the goods have already left his possession.

Revolving Credit

There is an unfortunate ambiguity in the term "revolving credit." It is applied to a credit which is renewable and should perhaps be confined to those which are automatically replenished to the original amount as bills drawn thereunder are run off and paid. It is however variously used to describe long term credits where regular drawings are anticipated and limits are imposed as to the maximum amount to be drawn in any stated period (*o*). In consequence where either arrangement is contemplated care should be taken, both in the contract of sale and in the instructions

(*o*) *Cf.* the opinion expressed by the expert witness in *Nordskog* v. *National Bank* (1922) 10 Ll.L.Rep. 652 with those of Witheridge, *The Finance of Foreign Trade* (being the Spring Lectures delivered at the Institute of Bankers, 1950), at p. 37.

of the buyer to the issuing banker, to explain in some detail the intentions of the parties.

The Machinery

Indeed, letter of credit machinery can work satisfactorily only if exact instructions are given at every stage. The machinery is easily clogged by misunderstanding for it is composed of distinct but inter-related agreements and undertakings. These give expression to the following separate legal relationships :—

(i) As between the seller and the buyer, and represented by the contract of sale.

(ii) As between the buyer and the issuing banker, and represented by an agreement entered into prior to the issue of the letter of credit. This agreement, if the buyer is to be permitted to postpone reimbursement until after subsale, may give place to a letter of hypothecation or trust receipt; the buyer in return for receiving the shipping documents from the issuing banker undertakes in such circumstances to hold them, or the goods on arrival, or the proceeds of subsale, on the banker's behalf.

(iii) As between the issuing and the correspondent bankers, and represented by the acceptance of the correspondent of the issuing banker's instructions.

(iv) As between either the issuing or the correspondent banker and the seller, and represented by the letter of credit.

Each agreement or undertaking must be individually construed and should be consistent one with another. The separate bankers in particular will take care to ensure that their obligations are dependent only upon performance of those conditions which will entitle them to reimbursement.

The letter of credit must be established within the time limit specified in the contract of sale. In the absence of agreement the courts will imply a time limit as best they can. It has long been accepted that, where the period of shipment is also unspecified, the buyer must establish the credit within a reasonable time, which must then necessarily be measured from the date of contract (*p*). And where the contract insists that the buyer is to provide the credit immediately he is nevertheless to be accorded such time as would be needed by a person of reasonable diligence (*q*).

Difficulties have arisen where the shipment date has been specified but the date for the establishment of the credit has not.

(*p*) *Kromman & Co.* v. *Steinberger* (1922) 10 Ll.L.Rep. 39.
(*q*) *Garcia* v. *Page & Co.* (1936) 55 Ll.L.Rep. 391.

In *Pavia & Co.* v. *Thurmann-Nielsen* (*r*) the Court of Appeal held that the buyer was not entitled to wait longer than the first date of the shipment period even although that period may stretch over several weeks or months. The decision gave ground for the suggestion that the credit need not be opened before that date. This latitude however cannot be given to the buyer without the possibility of serious inconvenience to the seller. It was accordingly urged upon Devlin J. in *Sinason-Teicher Grain Corporation* v. *Oilcakes & Oilseeds Trading Co., Ltd.* (*s*), that the obligation to establish the credit within a reasonable time arises even where the shipment period is indicated, but that the first date of that period is nevertheless relevant as the date before which reasonable time is to be calculated. Devlin J. after distinguishing the *Pavia* case favoured this argument, indicating that reasonable time should be calculated backwards from the date of shipment rather than forwards from the date of contract. The Court of Appeal took the same view (*t*) and the decision in the *Pavia* case is not to be construed to the contrary.

The effect of the stipulation in the contract of sale that a credit should be provided within a certain time was considered in *Trans-Trust S. P. R. L.* v. *The Danubian Trading Co., Ltd.* (*u*), where Denning L.J. emphasised that much must depend upon its context. He remarked :

" What is the legal position of such a stipulation ? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation ' subject to the opening of a credit ' is rather like a stipulation ' subject to contract.' If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit."

If the contract is to be complete the parties must be *ad idem* as to the nature of the credit and of the documents against which payment is to be made (*a*). The buyer thereupon takes the

(*r*) [1952] 2 Q.B. 84.
(*s*) [1954] 1 W.L.R. 935.
(*t*) [1954] 1 W.L.R. 1394.
(*u*) [1952] 2 Q.B. 297, at p. 304.
(*a*) *Schijveschuurder & others* v. *Canon (Export), Ltd.* [1952] 2 Lloyd's Rep. 196.

responsibility of ensuring that the appropriate credit is made available at the stipulated time, and in instructing the issuing banker he would be well advised to reiterate the exact phraseology set out in the contract of sale.

The difficulties that most frequently arise in letter of credit transactions concern the description of the goods set out in the shipping documents. The buyer if he is to ensure that he is to receive goods of the same nature as those which he contracted to buy will instruct the issuing banker on the form that these documents are to take and in particular on the details to be contained in the bill of lading. These instructions will in turn be passed on to the correspondent banker and will be incorporated in the letter of credit. If either banker accepts shipping documents that are not in accordance with his instructions he does so at his peril. The principles have been firmly set down and can hardly be over-emphasised.

In *English, Scottish and Australian Bank, Ltd.* v. *Bank of South Africa* (*b*), Bailhache J. said :

" It is elementary to say that a person who ships in reliance on a letter of credit must do so in exact compliance with its terms. It is also elementary to say that a bank is not bound or indeed entitled to honour drafts presented to it under a letter of credit unless those drafts with the accompanying documents are in strict accord with the credit as opened."

In *Equitable Trust Co. of New York* v. *Dawson Partners, Ltd.* (*c*), Lord Sumner said :

" There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk."

In *J. H. Rayner & Co.* v. *Hambro's Bank, Ltd.* (*d*), Goddard L.J. said :

" If I employ someone at a remuneration to pay money for me on getting a receipt in a particular form and he pays the money without getting the receipt in that form, he has not carried out the duty which I imposed on him. It would be no answer for him to say ' Well, I got a receipt which in fact gives you all

(*b*) (1922) 13 Ll.L.Rep. 21, at p. 24.
(*c*) (1927) 27 Ll.L.Rep. 49, at p. 52.
(*d*) [1943] 1 K.B. 37, at p. 43.

reasonable protection.' My answer to that would be : 'You are not concerned with the protection which you have given me. You are concerned to carry out the orders which I gave you, and you have not done it.' "

In the last-mentioned case the credit called for " Coromandel ground nuts " and the banker was held to be entitled to reject a bill of lading which related to " machine-shelled ground nuts " even although in the custom of the trade the two descriptions meant the same thing. So also in *Bank Melli Iran* v. *Barclays Bank* (*e*), McNair J. indicated that a credit which called for " new " trucks was not satisfied by a bill of lading which described them as " in new condition." Nevertheless there are circumstances where a seller cannot easily obtain an adequate description in the bill of lading even where the shipment is in order. A London banker remarks that of the very many presentations of documents that may be made at a City branch in one day, " about one half are on their first presentation out of order " (*f*). He adds that in respect of most irregularities bankers will usually be prepared to accept indemnities or bank guarantees. It is only thus that they can reconcile the practical difficulties of the seller with their own strict liability.

Transferable, Transmissible and Divisible Credits

Since the Second World War the letter of credit machinery has been further complicated by the development of the transferable, transmissible and divisible credits (*g*). Bankers vary in their interpretation of these terms, and in the prevailing uncertainty Megrah has urged that efforts should be made to reach agreement in order that some uniformity in practice may be attained (*h*). Meanwhile there is a particular anxiety in this sphere of law to keep it as free from judicial dicta as possible (*i*), and although commercial contracts in which these credits have played a part have been considered by the courts (*k*), the credits themselves have yet to be judicially construed.

These credits have been designed to cover tripartite transactions, and accordingly involve further legal relationships in

(*e*) [1951] 2 T.L.R. 1057.
(*f*) Witheridge, *loc. cit.*, p. 42.
(*g*) See Nash, " Transferable Credits," *Journal of Institute of Bankers*, (1952) Vol. 73, p. 15.
(*h*) Megrah, *loc. cit.*, p. 56.
(*i*) *Donald H. Scott & Co.* v. *Barclays Bank* [1923] 2 K.B. 1, at p. 10, *per* Bankes L.J.
(*k*) *Nicolene, Ltd.* v. *Simmonds* [1952] 1 Q.B. 543; *Pavia & Co. S. P. A.* v. *Thurmann-Nielsen* [1952] 2 Q.B. 84; *Heisler* v. *Anglo-Dal, Ltd.* [1954] 1 W.L.R. 1273.

addition to those already outlined. Let it be supposed that the seller contracts to sell to the overseas buyer goods which the seller must himself obtain from a supplier, and, further, that the seller wishes the buyer to know neither of the extent of his profit nor of the name of the supplier, lest the buyer should be tempted to do business direct. The transaction may be financed, though in a somewhat cumbersome manner, by two conventional credits placed back to back—*i.e.*, the buyer provides a confirmed irrevocable credit in favour of the seller, who thereupon, assured of ultimate payment, provides a similar credit for a lesser amount in favour of the supplier. A transferable credit serves merely to telescope the two " back-to-back " credits. It authorises the seller to transfer all or part of its benefit to the supplier whose name is revealed to the correspondent banker only. When that banker receives transfer instructions he will issue a confirmed credit for the lesser amount to the supplier, who will receive payment in the usual way on surrender of the shipping documents. The banker then requests the seller for his own invoices, which are substituted for those of the supplier and which, on surrender, entitled the seller to draw upon the banker or the buyer as the case may be for the remaining amount due.

It is unfortunately questionable whether merely the term " transferable credit " is sufficient authority for the banker so to split the benefit between the seller and his supplier. Some bankers require the additional term " divisible " (or alternatively " fractionable "), though this may be taken in other circles to have the wider meaning that the main credit may be replaced by a whole series of substituted credits. Similarly the term " transmissible " is sometimes taken to mean nothing more than " transferable," whereas other bankers regard it as a necessary description if the benefit of the credit is to be reallocated to another place and, perhaps, to another currency area (*l*).

Accordingly the seller who has such a transaction in mind will find little advantage in economy of adjectives. He will be prudent if he makes it clear in the contract of sale that the buyer is to provide, in all its glory, a confirmed, irrevocable, transferable, transmissible and divisible letter of credit.

(*l*) See Davis, *loc. cit.*, p. 30.

TAX PLANNING AND THE FAMILY COMPANY

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Advice is frequently sought by the owners of shares in private companies as to the action they may take now in order to mitigate the latent liability to estate duty. In considering this problem it is essential to take into account not only the potential charge to duty on the death of the shareholder but the present and future liability of the company and the other persons concerned to income tax and surtax and, in the case of the company, profits tax. For good measure, let us add that stamp duty and other costs incidental to any reorganisation should be kept to a minimum. It is superfluous to mention that each case requires careful and individual attention.

This article is an attempt to sketch some lines of action which are of assistance in most cases, to spotlight the main pitfalls waiting for the unwary and to illustrate briefly how any reorganisation should take its place in the general scheme of planning the family fortunes. In general it may be said that the greatest asset a man of wealth has is a united family, for, in addition to bringing him many things that money cannot buy, in these days it assists him to plan his own life despite the rapacious demands of the tax-gatherer.

Non-Controlled Companies

The first, and in some ways the simplest, case to consider is that of the owner of shares of considerable value in a company other than a company which is, or has at some time during the last five years been, under the control of not more than five persons within the meaning of that phrase for the purpose of the Finance Act, 1922, s. 21 (6) (*a*). On his death, unless prior thereto the company becomes controlled, the shares will fall to be valued by ascertaining " the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased " (Finance Act, 1894, s. 7 (5)). To the natural desire of an individual that his family shall enjoy his property after his death substantially undiminished by estate duty, there comes the added spur in the case of the shareholder in a private company, that this mode of valuation may artificially increase the value of his property for duty purposes. No " open market " exists for unquoted shares the transfer of which is

(*a*) Now Income Tax Act, 1952, s. 256.

restricted by the Articles of Association of the company. A hypothetical value is reached by the assumption that a sale in the open market may take place and that the notional purchaser will be registered despite the restrictions on transfer but that once registered he will nevertheless hold the shares subject to those restrictions (*C. I. R.* v. *Crossman & others* [1937] A.C. 26). It is, indeed, to use the words of Danckwerts J. (*b*), a question of entering "a dim world peopled by the indeterminate spirits of fictitious or unborn sales."

Possible courses of action

In general terms there are two courses of action which will reduce the prospective liability to estate duty; either the value of the shares must be reduced or the shares must be parted with so that they no longer form part of the estate. The former method suffers from the obvious disadvantages (i) that, by hypothesis, the shareholder does not control the company, and here the co-operation of others is needed effectively to carry out any plan, and (ii) that it may be very difficult to ensure that the value taken from the shares accrues to persons whom the owner of the shares wishes to benefit. The latter method is restricted by the provisions of the estate duty legislation in relation to gifts, whereby no gift is effective to clear the property from duty unless made more than five years from the death of the deceased (*c*).

Reducing shareholding

The most important method of reducing the potential estate duty liability is by parting with the shares or some of them. This may be done by sale, outright gift or the creation of a trust.

Sale. Sale is the main method of taking the shares completely out of the potential charge to duty immediately though, of course, the sale price, in so far as it still forms part of the estate of the deceased at his death, will be dutiable.

Where, as may frequently happen, the shares are sold to a relative (*d*), then the difficult question of valuation arises. If sold

(*b*) *Holt* v. *C. I. R.* [1953] 2 All E.R., at p. 1501.

(*c*) Finance Act, 1894, s. 2 (1) (c); Customs and Inland Revenue Act, 1881, s. 38; Customs and Inland Revenue Act, 1889, s. 11; Finance Act, 1946, s. 47.

(*d*) Relative means in relation to the deceased:—

(a) the wife or husband of the deceased;

(b) the father, mother, children, uncles and aunts of the deceased; and

(c) any issue of any person falling within either of the preceding paragraphs and the other party to a marriage with any such person or issue;

and references to "children" and "issue" include references to illegitimate children and to adopted children.

to a relative at a price less than "full consideration in money or money's worth" then the disposition will be deemed to be a gift (Finance Act, 1940, s. 44; Finance Act, 1950, s. 46). The effect of deeming the disposition a gift will be that if the deceased dies within five years the shares will be dutiable and will be valued at the date of death, a deduction being made for any partial consideration in money or money's worth paid to the deceased for his own use and benefit. If the purchase price is not *paid* (*e*) to the deceased for his own use and benefit, or if it consists of the creation in favour of the deceased of an annuity or other interest limited to cease on the death of the deceased or any other person, it is not treated as consideration.

Gift. An outright gift of shares, probably to the person to whom these shares would have been given by his will, effectively disposes of the shares for estate duty purposes if the shareholder survives the transaction by five years. Should he die within the five years then duty will be payable on the value of the shares at the date of *his death* and not at the date of the gift. It may be noted, therefore, that if the company goes into liquidation after the date of the gift and before the death there may be no duty payable, the property having been destroyed (*cf. Iveagh* v. *C. I. R.* [1954] 1 All E.R. 609, *per* Upjohn J. at p. 617). Stamp duty on the gift will be payable *ad valorem* at the rate of £2 per £100 of the value. If a direct gift is contemplated it must be kept in mind that, if the recipient is an infant unmarried child of the donor, the gift will be a "settlement" within the meaning attached to that word for the purposes of the Income Tax Act, 1952, s. 397, and any dividends or other income paid to or for the benefit of the child will be deemed income of the donor for both income tax and surtax assessments (*f*).

Creation of trust. The creation of a settlement for the benefit of members of the shareholder's family has numerous advantages over the outright gift as a method of disposing of shares in order to avoid estate duty and to gain the greatest financial benefit. There must be no benefit retained by the settlor or the transfer will be of no avail for estate duty purposes (*g*); if no such benefit is retained the property will remain potentially dutiable for five years only.

The first advantage to be gained by the use of a settlement is that by this means the settlor may indirectly keep some control

(*e*) This appears to include the case of the purchase price being left on loan.
(*f*) Income Tax Act, 1952, s. 403; *Thomas* v. *Marshall* [1953] A.C. 543.
(*g*) Customs and Inland Revenue Act, 1889, s. 11.

over the use of the votes and the general management of the fund. The trustees will be the nominees of the settlor and he may also retain the power to appoint new trustees. He should not, however, be one of the trustees himself, for the fiduciary capacity of a trustee may be ignored for many purposes of the estate duty legislation where such capacity is self-imposed (*e.g.*, Finance Act, 1950, s. 46). The settlor may retain power to veto decisions of the trustees, such as a decision to sell the shares or to make appointments under any powers he may give them.

By far the greatest advantage of a trust is that it permits arrangements to be made for the maximum conservation of the family's income. A discretionary trust providing for the payment of the income amongst a class at the discretion of the trustees will provide for great flexibility in placing income where it is needed and will attract little tax, and will also secure that no estate duty is payable throughout the duration of the trust (*h*). A trust for the benefit of the settlor's children, under which any dividends or other income are accumulated until the children attain the age of twenty-one or some greater age, will be effective to take such income out of the settlors' hands for tax purposes if the settlement is irrevocable (*i*), and yet on receiving the accumulations when they attain twenty-one the children may claim the personal reliefs and allowances to which they were entitled during the period of accumulation (Income Tax Act, 1952, s. 228). Income given direct to infant grandchildren will be subject to income tax in their hands at a low rate and would not be deemed income of their parents or of the settlor. Provision may be made for the trustees to have an overriding power to rewrite the trusts completely if future legislation or changes in the family fortunes so demand, thus achieving by forethought in the drafting of the trust that which even the High Court has no power to do. (*Chapman* v. *Chapman* [1954] A.C. 429.) In each case the provisions of Part XVIII of the Income Tax Act, 1952, must be carefully watched to ensure that the income from the shares which no longer accrues to the settlor is not assessable as part of his income to income tax or surtax.

In making the settlement it is advisable, if the necessary funds are available, to settle cash rather than the shares themselves and allow the trustees to purchase the shares from the settlor. Although no saving of stamp duty is effected (the share transfers being stampable *ad valorem*), should the settlor die within five

(*h*) *Cf. Burrell* v. *Att.-Gen.* [1937] A.C. 286.
(*i*) Income Tax Act, 1952, s. 398, 399. But note Law of Property Act, 1925, s. 164.

years, duty will be payable on the cash settled and not on the value of the shares (*Sneddon* v. *Lord Advocate* [1954] A.C. 257).

A final word of warning may be given with respect to cases where it may be intended to give some employees a benefit under a trust. If such benefit is to be given by an appointment of capital, care must be taken to ensure that the appointed sum is received as capital by the employee, and is not so directly connected with his employment that it may be regarded as remuneration for services rendered. If the " gift " falls within the latter category then, although given not by the company but by a shareholder, it may be taxable under Schedule E (*Patrick* v. *Burrows* [1954] 15 T.R. 73).

Reducing value of shares

Little need be said on the question of reducing the value of shares in the case of a non-controlled company. As noted above it is a method of reducing potential liability which requires the co-operation of the other shareholders and can only be of use in special circumstances. However, if it is intended that the other members of the company, or some of them, shall receive the interest of the shareholder there are certain advantages to be gained from reducing the value of his shares rather than transferring them. Stamp duty is saved by not having any passing of beneficial ownership of shares and estate duty is saved certainly after five years and in some cases immediately.

Shares may be reduced in value by passing the necessary resolutions to take away the rights, or some of the rights, attaching to those shares, such as voting and dividend rights, freedom of transfer and rights in a winding up. By restricting the older man's rights of voting and receiving dividends a greater measure of control may be given to the younger man simply and inexpensively. Such action, which cannot be taken without the shareholders' consent, may well not be effective for estate duty purposes until the expiration of five years. If a benefit is conferred on someone else by the restriction, such benefit may be dutiable as a gift (*k*), and certainly will be so if the recipient of any benefit is a relative (*l*). The granting of additional rights to shares other than those held by the shareholder in question will also depreciate the value, and such action may well be effective immediately if it confers no benefit on a relative. Such a reorganisation is often carried out by converting the shares in question into a separate class of shares,

(*k*) Finance Act, 1940, s. 45 (2).

(*l*) Finance Act, 1940 ss. 44 and 59; Finance Act, 1950, s. 46. For definition of relative in this connection see footnote (*d*) *ante*, p. 46.

and, in appropriate circumstances, may be followed by an issue of bonus shares (*m*) or debentures to the other classes.

The very simplicity of the few examples of altering share values given in the last paragraph may be taken as a warning of the dangers. Such action should, in general, only be taken where the company is the prime mover; if the company may on the death of some of its older shareholders pass into different hands through the necessity of selling shares for the raising of duty, such methods of protecting its interests are justified. Care should be exercised, however, or the company may become controlled and the severer dangers attaching to shares in such a company unwittingly confronted.

CONTROLLED COMPANIES

Many more difficult considerations arise where the company in question is one which is under the control of not more than five persons (*n*), relatives, partners and beneficiaries under a trust respectively being counted as one person and nominee shareholdings being credited to the beneficial owner (*o*).

The first effect of the company being so controlled is that the prospective liability of certain shareholders is altered, for their shares will fall to be valued not by the "open market price" method described above, but by apportioning to them a proportion of the net value of the assets (including, of course, the goodwill), of the company in accordance with the Finance Act, 1940, s. 55 (2). The shareholders so affected fall into two categories. In the first category we find a shareholder who dies whilst the company is so controlled or within five years of its ceasing to be so controlled and who, at any time during the five years immediately preceding his death, had voting control of the company otherwise than in a fiduciary capacity (*p*). The second category consists of shareholders who die whilst the company is so controlled or within five years of its ceasing to be so controlled and who must be treated as if they had voting control at some time during the five years immediately preceding their deaths. A shareholder must be treated as if he had so had control if (i) for two years out of the five immediately preceding his death he had "powers equivalent to

(*m*) The issue of bonus shares after a gift of shares allows advantage to be taken of the decision in *Att.-Gen.* v. *Oldham* [1940] 2 K.B. 485. The bonus shares are not dutiable if the donor dies within five years of the gift for the bonus shares were not given by the donor.

(*n*) Finance Act, 1940, s. 58 (1).

(*o*) Income Tax Act, 1952, s. 256 (formerly Finance Act, 1922, s. 21 (6) and Finance Act, 1936, s. 19). Relative for this purpose means "husband, wife, ancestor, lineal descendant, brother or sister."

(*p*) Finance Act, 1940, s. 55 (1) and (3) (a).

control " (*q*) (virtually that he had control of the board of directors) or received the benefit of more than half the dividends and interest payable by the company or (ii) at any time during the five years he had a beneficial interest in more than one half of the company's shares and debentures (*r*).

Shares passing on the death of shareholders in the first category are all valued on the " assets " basis whether those shares pass on the death or are only deemed to pass (*Re Halls Settlement, Sanderson* v. *C. I. R.* [1954] 3 W.L.R. 675). This is however subject to one statutory exception (Finance Act, 1954, s. 30 (2)). Where the shares have been the subject of a gift *inter vivos* made by the deceased without retention of benefit and the Commissioners are satisfied that the donee (i) was an employee or ex-employee or the widow or orphan of an employee or ex-employee (ii) was not a relative (*s*) of the deceased and (iii) did not have control or powers equivalent to control either alone or in conjunction with his relatives immediately after the death or at any previous time since the gift, the valuation will be made on the open market price basis.

Shares passing or deemed to pass on the death of shareholders who are treated as if they had had control (but did not in fact have control) are only valued on the assets basis if (i) immediately after the death or, in the case of a gift, at any time since the gift the beneficial owner and his relatives have voting control or powers equivalent to control or (ii) immediately before and after the death the shares are held by trustees who have voting control by virtue of the shares held in trust (*r*).

The valuation under the Finance Act, 1940, s. 55, is carried out by ascertaining the value of the company's assets by the " open market price " method, deducting liabilities (those not yet matured being valued at the death (*t*)) other than liabilities in respect of shares and debentures, and apportioning the resultant sum between the classes of shares and debentures " with due regard to the rights attaching thereto respectively." The value of a share is then taken to be a rateable proportion, ascertained by reference to nominal amount, of the sum apportioned to the class to which that share belongs.

Voting control—should it be abandoned ?

It has generally been assumed, in a case where the shares held will fall to be valued on the assets basis, that it is of primary

(*q*) Finance Act, 1954, s. 31 (1).

(*r*) Finance Act, 1954, s. 29. This is of necessity a short summary and reference must be made to the relevant section for the detailed wording.

(*s*) Relative means " husband, wife, ancestor, lineal descendant, brother or sister."

(*t*) Finance Act, 1940, s. 50 (1).

importance first of all to shed the voting control (actual and "deemed") held by the shareholder. The reason for doing so is that, provided the shareholder then survives five years, the shares will fall to be valued on the normal basis of "open market price." Such action is not necessary in every case and in certain circumstances may even be disadvantageous if no further action is taken.

Dealings on stock exchange. It is not necessary to shed control if permission to deal can be obtained from the committee of a recognised stock exchange in the United Kingdom and dealings in fact take place, in particular during the year ending with the death of the shareholder. In such case the shares are specifically exempted from the provisions of the Finance Act, 1940, s. 55, by subsection (4) thereof.

Agricultural property. Where the company is engaged in husbandry or forestry the reduced rates of estate duty applicable to agricultural property (*u*) are to be applied to such part of the value apportioned to the shares of the deceased as is attributable to the agricultural value of agricultural property occupied by the company for the purpose of husbandry or forestry (Finance Act, 1954, s. 28 (2) (b)).

Industrial hereditaments, machinery and plant. The Finance Act, 1954, s. 28, gives, for the first time, some relief from the full rates of estate duty in respect of industrial hereditaments used in and occupied for the purpose of a business which passes on a death and also in respect of machinery and plant so used. This reduction, which is of forty-five per cent. in each of the rates, is also made applicable in certain circumstances where shares of a company pass on the death and fall to be valued on the assets basis, and the industrial premises, machinery and plant are used in and occupied for the purpose of the company's business or that of a subsidiary of the company. No similar reduction is given in the case of such property if occupied and used by a company where the shares fall to be valued on the normal "open market price" system.

A most important application of this section is where the controlling shareholder himself owns the land, premises, machinery and plant, used by the company and has leased them to the company. In such a case it is provided that "any interest of the deceased as lessor in industrial hereditaments used in and occupied for the purposes of the company's business or in machinery or plant so used shall" be charged at the reduced rate. Hence there may

(*u*) Finance Act, 1925, s. 23.

be great advantage to be gained by the controlling shareholder acquiring the land and premises used in the company's business and leasing them to the company.

Where shares or debentures of a company fall to be valued under the Finance Act, 1940, s. 55, the duty is calculated taking into account the forty-five per cent. reduction in respect of so much of the value as is attributable to the value of industrial premises, machinery and plant used for the business of the company. Similarly if the company leases such property to its subsidiaries, the value of the company's interest as lessor attracts the relief. Where part of the assets of the company is shares of a subsidiary, in valuing the subsidiaries shares account may be taken of premises and machinery used by the subsidiary and the interest of the subsidiary as lessor in premises and machinery let to the company (*a*). In arriving at the value of those assets by reference to the value of which duty is to be charged at a reduced rate it is, of course, necessary to take into account liabilities. This is provided for by the Finance Act, 1954, s. 31 (6). Liabilities are primarily deducted from assets other than those whose value attracts the relief unless the liability is secured on those assets. Hence, the greatest measure of relief can be obtained if there are no charges on the industrial premises, machinery and plant. If it is necessary to use such property as security, then other property should, if possible, be included in the charge so as to spread the deduction of the liability.

It follows, therefore, that if a large part of the value of the company is attributable to its premises and plant, and the controlling shareholder does not wish to part with his entire interest in the company, it may be advisable to retain voting control. In fact the writer has already come across a case in which a shareholder was benefited by obtaining control, the premises used by the company being in his hands and subject to no charges.

Anticipated sale. If it is anticipated that on the death of the controlling shareholder his shares will be disposed of to persons outside his family by sale, then the valuation may, in effect, fall to be made on the " open market price " basis even though control is retained until death. The Finance Act, 1954, s. 30 (1), provides that if a sale at arm's length is made by the persons accountable for the duty on the shares or by the persons to whom they pass, then the value of those shares shall be taken to be the price obtained, adjusted to take account of any delay since death. Neither the vendor nor any person interested in the proceeds of sale must

(*a*) Finance Act, 1954, s. 28 (3).

be a relative (*b*) of any person concerned as purchaser or having an interest in the purchase. The price cannot be artificially deflated by the issue of bonus shares, nor altered by sub-dividing the shares into shares of smaller amount or by consolidating and dividing the shares into shares of larger amount subsequent to the death (*c*).

This relief on a sale within three years of the death is not prejudicial to the industrial hereditaments relief discussed above (Finance Act, 1954, s. 31 (4)).

Summary. If the controlling shareholder does not wish to part with sufficient of his interest in the company to render a valuation on the "open market price" basis of small moment, then serious consideration should be given to the methods, some of which are outlined above, whereby an "assets" valuation is less to be feared before control is parted with. Parting with control is a serious step from the business point of view and should not be taken lightly. In addition there may be many cases where, due to ill-health or old age, the controlling shareholder may not be expected to survive five years. In such a case there may be greater advantage to be derived by reducing the effect of an assets valuation than by attempting to avoid it completely.

Courses of action where control abandoned

Where the controlling shareholder is concerned mainly with the exclusion of as much property as possible from his estate the basic lines of action which he may take to reduce his shareholding are similar to those outlined above in the case of non-controlled companies, that is to say, sale, gift and the creation of a trust. Owing to his control of the company he may be in a position to compel a reconstruction or liquidation if that be advisable. The variations available in particular cases are of course innumerable but the dangers are common to all. Unlike the minority shareholder the person who has the voting control is generally in a position to dictate the course of action desired, and it is for this reason that the legislation restricting the reorganisation of that person's interests often identifies the action of the company with the action of the shareholder. Similarly the members of a controlled company are often considered to be the same person as the company and the separate legal existence (*d*) of the company can be ignored. An example of this latter provision is to be found in the application of the Finance Act, 1940, s. 44, as amended by the Finance Act,

(*b*) Relative means "husband, wife, ancestor, lineal descendant, brother or sister."

(*c*) Finance Act, 1954, s. 30 (5).

(*d*) *Salomon* v. *Salomon & Co.* [1897] A.C. 22.

1950, s. 46, which has already been mentioned above. Where a disposition is made to a relative (see footnote (*d*) page 46, *ante*) by this section such disposition is, in certain circumstances deemed to be a gift. Similarly, if the disposition be made in favour of a controlled company any member of which is a relative of the disponor, the section may operate to deem that disposition a gift (*e*).

In the Finance Act, 1940, s. 46, the Revenue now have in their hands a powerful weapon which was given to them in order to prevent persons from obtaining large benefits from controlled companies during their lives (*e.g.*, shares with special dividend rights, directors' fees, options) with no correlative duty payable on their deaths, the property then passing having been reduced to a minimum by the shedding of shares and debentures. This weapon is more powerful than would be necessary to catch the tax evader, for the motives of the individuals concerned are not material. However, the Revenue have announced that they will apply the provisions of the section in a reasonable manner, although it is questionable by what power they presume so to modify the law, the terms of the section being mandatory. The section raises a charge to duty on a slice of the company's assets on the death of the deceased where (i) the deceased has at any time made a transfer to the company of any assets, (ii) the deceased received any benefits from the company in the five years immediately preceding his death and (iii) the company was a controlled company at any time between the transfer and the date of death. Transfer of assets includes a payment of money such as a cash subscription for shares (*f*), the sale of a business to the company and any other transfer of property whether foreign or not. Such transfer may have taken place at any time however long before the death, and may have been made indirectly by means of " associated operations " (*g*). Benefits include not only interest and remuneration but enjoyment in specie of the company's property and periodical payments that the deceased could have received out of the resources of the company by the exercise of any power; receipt is defined to include, as well as actual receipt, application for the benefit of the deceased, control over the application by the deceased, and user so as to increase the value of property held by the deceased (*h*). Reasonable remuneration to the deceased for any services rendered by him as the holder of an office under the company is not, however, treated as a " benefit " (Finance Act, 1940, s. 51 (4)). The

(*e*) Finance Act, 1940, s. 44 (4).
(*f*) Finance Act, 1952, s. 72 (2), reversing *Att.-Gen.* v. *Aubyn* [1952] A.C. 15.
(*g*) Finance Act, 1940, ss. 58 (2) and 59.
(*h*) Finance Act, 1940, ss. 47 and 58 (3).

slice of the company's assets which is to be included in the charge to duty is an amount which bears the same ratio to the assets as the aggregate amount of the benefits accruing to the deceased from the company in the last five accounting years bears to the aggregate amount of the net income of the company for the said years (*i*).

The above brief summary of the main outline of the Finance Act, 1940, s. 46, and its associated sections is intended to demonstrate the extremely wide nature of that provision. If a company has been a controlled company at any time since a present member was allotted shares, it is most likely that section 46 could be invoked on his death. This must be taken as a warning that any attempt to mitigate estate duty, whilst retaining benefits out of proportion to services presently rendered, is liable to have the opposite effect and increase rather than diminish the liability.

Sale and gift. The sale of shares and the gift of shares raise similar difficulties to those already mentioned in the case of non-controlled companies. The added difficulty in the case of a disposition in favour of a company amongst whose members are numbered relatives of the person making the disposition has already been mentioned. A further question which must be taken into account when disposing of the shares in a controlled company is that the company may be holding a large amount of undistributed income. In such a case the company may be made the subject of a direction by the Special Commissioners under the Income Tax Act, 1952, s. 245, whereby the undistributed income of the company is apportioned amongst the members of the company for the purposes of assessing the members to surtax thereon. With very few exceptions companies to which sections 46 and 55 of the Finance Act, 1940, apply also come within the ambit of the surtax legislation (*k*). It was clearly stated by the then Chancellor of the Exchequer in July, 1948, that the Revenue would not take action under the Income Tax Act, 1952, s. 245, where a company maintained a rate of dividend previously considered reasonable even though the profits of the company had increased. However, he added that where avoidance devices, such as the withdrawal of money from the company in the guise of capital, were employed, action might be taken. Before any reorganisation of a controlling shareholder's interests take place, particularly if it is intended to make a bonus issue of shares or debentures to donees of shares after they have been transferred, or to pay any large sum to directors

(*i*) Finance Act, 1940, s. 46 (2), as amended by Finance Act, 1946, s. 47 and Schedule XI.

(*k*) Income Tax Act, 1952, s. 256.

for loss of office, a clearance certificate under the Income Tax Act, 1952, s. 252, should be obtained.

Creation of trust. In addition to the points raised under this head in the case of non-controlled companies, there are a number of factors to be kept in mind when dealing with a controlled company. Having mentioned the Income Tax Act, 1952, s. 245, in the last paragraph, it is convenient to mention here possible preventive action which may be taken to discourage future direction by the Special Commissioners. It being assumed that the shareholder wishes to dispose of his shares upon trusts for the benefit of his family and perhaps employees, can he safely provide for income to be kept in the company whilst the capital is appreciated? If he can, then profits tax will be paid (*l*) at a lower rate, no surtax will be paid and the restrictive provisions on the accumulation of income contained in the Law of Property Act, 1925, s. 164, may be circumvented. To achieve this position the safest procedure is to adopt a discretionary trust under which the shares are held by the trustees who may distribute income during a period of time sufficiently short to comply with the rule against perpetuities amongst a definite class of beneficiaries (*m*). The existence of the trust itself will not prevent a direction under the Income Tax Act, 1952, s. 245 (*Roomwood Investment, Ltd.* v. *C. I. R.* [1942] 1 K.B. 420), but it is doubtful whether an apportionment of income can be made to the beneficiaries for none of the beneficiaries has, by himself, any right to any income under the trust (*Re Smith, Public Trustee* v. *Aspinall* [1928] Ch. 915). If an apportionment could be justified then by reason of the equal rights of the beneficiaries such apportionment would probably have to be made equally. If, therefore, the class of beneficiaries is made sufficiently wide (it should be large, in any case, to prevent estate duty being payable on the death of any one of the beneficiaries) little or no surtax would be paid even if an effective apportionment were made. It is believed that the present Revenue practice is not to make a direction where shares are held on a discretionary trust.

A further advantage of the discretionary trust is that there is less likelihood of a situation arising where the beneficiaries will be in a position to dictate to the trustees the manner in which they should exercise their powers. Even beneficiaries all *sui juris* and between them entitled to the whole of the trust fund cannot dictate to the trustees how their discretion should be exercised (*cf.*

(*l*) Finance Act, 1947, s. 30, as amended.

(*m*) The class must be definite and ascertainable: *cf. C. I. R.* v. *Broadway Cottages Trust* [1954] 3 W.L.R. 438.

Re Brockbank [1948] Ch. 206), but they can, of course, put an end to the trust. If the class of beneficiaries always contains an infant or there is a possible residuary beneficiary who is an infant or unborn this latter situation cannot arise.

Where the method of dissipation of the interest of a controlling shareholder is such that the shares may be held by someone else who either alone or in conjunction with his relatives has control or powers equivalent to control or by the trustees of some trust who will have control by virtue of shares held by them as trustees (*n*), it is essential to alter the articles of association of the company in order to ensure that the erstwhile controlling shareholder no longer retains powers equivalent to control. Frequently the controlling shareholder is the founder of the business and is the Governing Director or has various powers of appointment and removal of directors which will amount to "powers equivalent to control" (*o*). These rights given by the articles must be removed and the reigning Governing Director must have no power to resume that office.

Protection of the position of the shareholder giving up his shares

The head of a family who seeks advice on how he may conserve his assets from the hands of the Revenue so that his children may enjoy them, although willing to give up many benefits in favour of his family, may nevertheless be justifiably anxious when this necessitates removing his control of the company. How is his old age to be adequately provided for? Although he may continue to draw remuneration from the company, he may be removed by persons over whom he has no control. To a certain extent this query is answered by the judicious choice of trustees, family ties and the retention of other assets. However, an assured income may be arranged for by means of a service agreement which will provide not only for a salary during his working life but also a pension on retirement. The amount of remuneration must be justifiable by the amount of work which the recipient will do and the value of his services rendered to the company. The amount of any pension to be given is a rather more difficult question, for in order to avoid what is in effect double taxation of the pension it is necessary for the agreement to be approved by the Commissioners of Inland Revenue. If not approved, then, in addition to the pension being taxable on receipt, the recipient will be taxed whilst working on a notional sum in each year until he retires

(*n*) Finance Act, 1954, s. 29 (5).
(*o*) Finance Act, 1931, s. 31 (1) (e).

equal to the sum which the company would have had to pay in that year to procure the payment of the pension by some third person (*p*). The Commissioners will approve only a pension for life (*q*) and one which is of an amount and nature set out in the six paragraphs of the Income Tax Act, 1952, s. 388. This normally means that the pension must be restricted to an amount which is equal to one-sixtieth of the salary of the recipient for each year of service with the company (subject to a maximum of two-thirds of his final salary) excluding from such service periods when the recipient was a controlling director. The Revenue practice is, however, fairly flexible if the company does not claim to set aside sums of money year by year, which it deducts from its taxable income, in order to secure the pension benefits by means of insurance policies or otherwise. In most cases the Revenue are prepared to discuss the question of quantum whilst the agreement is still in draft.

It should be noted in connection with pension benefits that if it is desired to make an arrangement whereby a pension is to be paid to the wife of a director or employee should he die during service, the agreement providing for it should be made separately from any agreement for a retirement benefit. The agreements for which consent of the Commissioners of Inland Revenue is necessary, as mentioned in the preceding paragraph, are those providing for " retirement or other benefits " as defined by the Income Tax Act, 1952, s. 390 (1). This definition expressly excludes " any pension, annuity, lump sum, gratuity or other like benefit which is to be afforded solely by reason of the death or disability of a person occurring during his service and for no other reason." In addition the provision for the payment to the widow in a separate agreement facilitates proof that the pension for the widow is an entirely different piece of property from the pension granted to her husband, and hence that estate duty is payable not under the Finance Act, 1894, s. 1, but under section 2 (1) (d) and without aggregation (*Re Payton, deceased* [1951] Ch. 1081).

Liquidation of company

In a short summary, such as this, of the general dangers inherent in reorganising a shareholder's interests with an eye on the mitigation of estate duty it is not possible to consider the diverse complexities of reconstruction, amalgamation and liquidation. A pure liquidation will rarely provide an adequate answer to the

(*p*) Income Tax Act, 1952, s. 386.
(*q*) Income Tax Act, 1952, s. 387.

taxpayer's problem, for he is not usually prepared for the destruction of his business without something being erected in its place. In addition a surtax direction under the Income Tax Act, 1952, s. 245, may deplete the resources of the company or additional profits tax may become payable due to non-distribution relief previously given. This latter liability is probably not now avoided by an issue of bonus shares to use up undistributed income prior to liquidation (Finance Act, 1951, s. 31). Any more complicated scheme for the transfer of the benefit of a company's business to the other members of the controlling shareholder's family or to companies in which they are interested raises immense problems. Apart from incidental problems, attention must always be given not only to the 1940 estate duty legislation, and the danger of surtax direction, which have been mentioned above, but to the extremely wide anti-avoidance provision now in the profits tax legislation. The Finance Act, 1951, s. 32, allows the Commissioners to recover profits tax that has apparently been effectively avoided by means of some transaction. If profits tax would have been payable but for some transaction which has been carried out, then if the Commissioners are of the opinion that one of the main purposes of that transaction was the avoidance of the tax, the Commissioners may recover the tax despite the transaction. If the main benefit which might have been expected to accrue from the transaction during the three years immediately following it was the reduction of profits tax liability, that reduction is deemed to be the main purpose of the transaction. It is apparently not necessary that, in the minds of the parties concerned, the reduction or avoidance of profits tax was the major consideration (*cf. Crown Bedding Co. Ltd.* v. *C. I. R.* [1946] 1 All E.R. 452).

NOTES OF RECENT CASES

1. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Shephard v. *Cartwright* [1954] 3 W.L.R. 967; [1954] 3 All E.R. 649 (H.L.)

Advancement — rebuttal of presumption — subsequent conduct — admissibility of evidence.—In this case children sought to recover from their deceased father's estate property representing shares which he had some 18 years earlier registered in their names, but had subsequently dealt with as his own property—the children having signed without knowledge or question documents put before them. The decision of the Court of Appeal ([1953] Ch. 728, affirming Harman J.) that there was no advancement produced in this journal (*ante*, Vol. 17, p. 309) the comment that "the law as stated in the textbooks has become rather uncertain as a result of this case."

The House of Lords has now reversed the Court of Appeal and reaffirmed the law as generally stated. Purchase by a parent in the name of a child raises a presumption of advancement, not of a resulting trust. In rebuttal, evidence of acts and declarations by the parties at or before the purchase, or so immediately after it as to constitute part of the transaction, is admissible whatever its result; evidence of subsequent acts or declarations is admissible only against the party doing or making them. Their Lordships therefore rejected the three further possibilities adumbrated in the Court of Appeal:—admitting all evidence of subsequent events but weighing it carefully; admitting evidence to show a course of dealing; and the establishment of a "half-way house" whereby a nebulous benefit only might be conferred, subject to the donor's overriding control. Either there is advancement or the child is a trustee. *Devoy* v. *Devoy* (1857) 3 Sm. & G. 403 was merely an example of rebuttal of the presumption (*per* Lord Morton of Henryton, 3 W.L.R. at p. 977; 3 All E.R. at p. 657). The presumption of advancement in the instant case was not rebutted.

The House also held that a completely constituted gift is good even if the donee is ignorant of the transaction, distinguishing *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57 as turning on the need for delivery to complete that particular gift. Such a donee is entitled to disclaim when he first becomes aware of the gift—*Stanley* v. *Bowring* (1885) 31 Ch.D. 282; *Mallot* v. *Wilson* [1903] 2 Ch. 494. Here, again, the accepted law was applied.

In the end, therefore, the case has contributed no new law. It does illustrate, however, both the inherent difficulties in the application of legal principles to actual facts, and the problems that may arise if a wife or children are used as nominees without a clear intention, clearly expressed.

Re Forsters' Settlement [1954] 1 W.L.R. 1450;
[1954] 3 All E.R. 714 (Ch.D.)

Variation of trusts—inherent and statutory jurisdiction—Trustee Act, 1925, *s.* 57.—Trust funds were held, after the death of E. F. in 1941, on trust for his first wife for life and thereafter absolutely for such of his children by a second marriage as attained twenty-one. Between 1942 and 1945 the court under its general jurisdiction (probably salvage) authorised four mortgages of the children's contingent reversionary interests. Mortgage interest was to accumulate till the reversions fell into possession. Two of the children were now over twenty-one and one aged nineteen. The court was asked to sanction the purchase by the trustees of the widow's life interest at considerably less than its actuarial value, so that the annual wastage caused by the mortgages could be stopped, and a claim for duties arising on E. F.'s death satisfied. Harman J. held (1) that there was no emergency which invoked the "salvage" jurisdiction of *Re New* [1901] 2 Ch. 534, because the mortgages had been proper (being authorised by the court) and in two years all parties would be *sui juris,* (2) that though by the judgments in *Re Downshire* [1953] Ch. 218 at pp. 244–51, and *Municipal and General Securities Co., Ltd.* v. *Lloyds Bank, Ltd.* [1950] Ch. 212, the ambit of section 57 of the Trustee Act, 1925, was limited to management or administration of trust property as such, and did not extend to variation of beneficial interests, yet in the very special circumstances an order authorising the purchase could and should be made under the section.

Though decided on its particular facts, this case suggests a limited line of escape from *Chapman* v. *Chapman* [1954] A.C. 429. Where a settlement creates protected or otherwise qualified life interests the court is asked, by "compromise" proposals, to override potential beneficial interests (see *Re Downshire, Re Blackwell* [1953] Ch. 218). In *Re Trenchard* [1902] 1 Ch. 378 the life interest was throughout subject to forfeiture on non-residence. *Re Salting* [1932] 2 Ch. 57 and *Re Mair* [1935] Ch. 562 were criticised in *Re Downshire*—[1953] Ch. at pp. 250, 251—because the transactions authorised under the Trustee Act, 1925, s. 57, reduced in amount the funds available to satisfy discretionary trusts that might become effective. In all these cases the controls imposed by the settlor on the beneficial interests were relaxed, which is not permitted since *Chapman* v. *Chapman.* But, where the life interest is unqualified, the beneficiary may sell it on the open market so the settlor has lost control. Purchase by the trustees of the settlement then has no effect on the vesting of any beneficial interests but merely accelerates their falling into possession. Is this a valid point of distinction, so as to enable the purchase to be termed a matter of investment—a transaction "specifically related to the management or administration by the trustees of trust property, *quoad* property" (*per* Evershed M.R. at [1953] Ch. p. 252)? If this be so, *Re Tollemache* [1903] 1 Ch. 457, 955, where trustees were refused permission to purchase a mortgage of the tenant for life's interest though the remaindermen would not have been prejudiced, becomes a case that *could* be decided differently since 1925, for section 57 of the Trustee Act is new. Of course, no

purchase of an unqualified life interest need be sanctioned—the submission is merely that there may be jurisdiction to do so.

Bullock v. *Lloyds Bank, Ltd.* [1955] 2 W.L.R. 1; [1954] 3 All E.R. 726 (Ch.D.)

Undue influence — parent and child — settlement by child on attaining twenty-one—rebuttal of presumption—revocation of settlement—laches—costs.—On attaining twenty-one in 1940 a daughter, the plaintiff, became absolutely entitled to £12,000. A month later she settled it on herself for life on protective trusts and thereafter on her issue and in default on her father and brother. The settlement was described by Vaisey J. as "rather crude" and omitted both a special power to appoint to children *inter vivos,* and a general power to override the father's and brother's interests. A power of complete revocation, with consent of the trustee—Lloyds Bank, Ltd.—was included. The settlement was made on the suggestion of the father, whose solicitor acted; he saw the plaintiff alone once but did not fully explain the various possibilities open to her, nor make clear that she was renouncing her right to capital. In 1949 the plaintiff became aware of objections to the validity of the settlement and from then till 1953, when the action to set the settlement aside was begun, tried to get the bank to consent to revocation.

On these facts Vaisey J. held (1) that the presumption of undue influence as between parent and child applied, (2) that this was not rebutted, because there was not completely independent advice, given with only the plaintiff's interest in view, nor were the various points discussed with proper deliberation, (3) in the circumstances, the plaintiff was not guilty of laches within *Allcard* v. *Skinner* (1887) 36 Ch.D. 145, (4) the settlement must be set aside, and (5) that though in this case the bank should have its costs, any trustee should examine the circumstance of such a settlement very carefully before accepting office.

The principles here applied were laid down in earlier cases, *e.g., Powell* v. *Powell* [1900] 1 Ch. 243 and *Inche Noriah* v. *Shaik Allie Bin Omar* [1927] A.C. 127. Where there is undue influence, settlements are revoked even against third parties whose benefits are attributable to the wrongful influence (*Huguenin* v. *Basley* (1807) 14 Ves. 273; *Morley* v. *Loughman* [1893] 1 Ch. 736) but not if their benefit is free from taint (*Powell* v. *Powell, supra*). The difference seems to be that between inducing a settlement and inducing a particular clause in a settlement.

This decision, and the earlier cases, underline the exceptional care which practitioners must take in such circumstances, and how easy it is for advice to be inadequate.

Re Coates, deceased, Ramsden v. *Coates* [1954] 3 W.L.R. 959; [1955] 1 All E.R. 26 (Ch.D.)

Power of appointment—certainty of objects—construction.—By his will a testator directed his executors to pay sums up to £25 to any friends his wife might feel he had forgotten, in order that they might buy a memento of their friendship. Roxburgh J. held (1) that these provisions conferred a power of appointment on the wife and (2) that the objects of the power were sufficiently defined because the court could determine, when it was proposed to make a payment, whether any particular individual was within the terms of the will, following *Re Gestetner's Settlement* [1953] Ch. 672. The cases striking out the word "friends" from the phrase "friends and relations," such as *Re Caplin's Will* (1865) 2 Drew & Sm. 527, were distinguished as turning on different words.

The principle here applied is now well established. Whether there is sufficient certainty in the objects of a power is in each case a question of construction (*Re Ogden* [1933] Ch. 678), and here the testator was fortunate in finding the learned judge able to place a favourable construction on somewhat loose and informal words.

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2. *LANDLORD AND TENANT*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Orman Brothers, Ltd. v. *Greenbaum* [1954] 1 W.L.R. 1520; [1954] 3 All E.R. 731

Landlord and Tenant Act, 1954*—notice to quit served after passing but before commencement of Act—taking effect after commencement of Act—notice not in prescribed form—retrospective effect of Act—notice not good.*—Problems under the Landland and Tenant Act, 1954, are not slow in coming before the courts. In this case a notice to quit business premises was given on August 31, 1954, to take effect on October 4, 1954. It was not in the form prescribed by Part II of the Landlord and Tenant Act, 1954, for an effective notice (effective, that is, within the limits set by the Act). As the Act was passed on July 30, 1954, and commenced on October 1, the notice to quit was served after the passing but before the commencement of the Act, and was intended to take effect after such commencement. The question was whether the notice was ineffective to terminate the tenancy because it was not in the form prescribed under the Act.

Devlin J. held, first, that the notice to quit was subject to the requirements of the Act, although served before the Act came into operation. It was clear from the provisions of the Act, such as paragraph 1 of the Ninth Schedule, that Parliament contemplated that the Act should have retrospective effect. Devlin J. dealt, secondly, with an ingenious argument, based on section 24 (3) (b), which provides that where, at a time when a tenancy is not one to which Part II

applies, the landlord gives a notice to quit, the operation of the notice is not to be affected by reason that the tenancy becomes one to which Part II applies after the giving of the notice. It was sought to use this as a transitional provision, and to argue that, as at the time when the notice to quit was given the tenancy was not one to which Part II applied (since the Act did not then apply at all), its operation was not affected by the coming into force of the Act. Devlin J. rejected this contention, holding that section 24 (3) (b) applied to cases of changes of user taking place after the Act was in operation, *i.e.*, changes of user between the date of the giving of the notice and the date of its taking effect. It could not be prayed in aid as a transitional provision to give immunity to notices to quit served before the Act came into operation. Devlin J.'s decision is in accordance with the views expressed by the editors of the new edition of *Woodfall*.

(Woodfall, 25th ed., Permanent Supplement, p. 12)

Reid v. *Dawson* [1954] 3 W.L.R. 810; [1954] 3 All E.R. 498

Agricultural holding—letting of the land for grazing or mowing during some specified period of the year—whether 364 *days a "specified period of the year"—exemption from Agricultural Holdings Act,* 1948—In this case the Court of Appeal affirmed the decision of the lower court (noted Vol. 18, p. 526) on a point of some interest to students of the Agricultural Holdings Act, 1948. Section 2 of the 1948 Act closes up the loophole which was revealed in the provisions of the Agricultural Holdings Act, 1923, by *Land Settlement Association, Ltd.* v. *Carr* [1944] K.B. 657, where it was held that a letting for 364 days, and thereafter for successive periods of 364 days, was not a letting for a term of years or from year to year, and was, therefore, outside the provisions of the 1923 Act. Section 2 of the 1948 Act, controls the letting of agricultural land for less than an annual tenancy by bringing it, with certain exceptions, within the Act. A letting for 364 days, unless it comes within one of the exceptions, is now converted into an annual tenancy, and is thus brought within the Act. One of the exceptions, however, is the letting of land for grazing or mowing only "during some specified period of the year". This phrase suggests some period with a particular agricultural significance, such as a winter or summer grazing season. It is clear, however, that in law anything short of 365 days is a "specified period" of a year, provided that it is clearly defined. 364 days is such a specified period, and so it was held to be in *Reid* v. *Dawson*. It was also held that the holding over after the expiry of the 364 days was by implication for another 364 days, and that the tenancy was not transformed by the holding over into an annual one.

(Jackson's Agricultural Holdings, 10th ed., pp. 107–8)

Woollett v. *Minister of Agriculture and Fisheries* [1954] 3 W.L.R. 776; [1954] 3 All E.R. 529

Agriculture Act, 1947—*agricultural land tribunals—validity of appointment of nominated members—appointment by secretary of tribunal — validity of Minister's certificate — Acquisition of Land (Authorisation Procedure) Act,* 1946.—The facts of this case and Stable J.'s decision were noted in *The Conveyancer* Volume 18, p. 513. It was pointed out there that Stable J. had placed a restricted interpretation both on paragraph 20 (2) of the Ninth Schedule to the 1947 Act and on paragraph 16 of the First Schedule to the 1946 Act. The reversal of his decision by the Court of Appeal was not altogether unexpected. It is unnecessary to recite the facts again here. On the question whether the secretary of the tribunal in his capacity as a servant of the Minister had authority to appoint the nominated members, and did in fact properly exercise such authority, the members of the Court of Appeal were not unanimous. Denning L.J. thought the secretary had no such authority. Jenkins L.J. thought that he had and exercised it. Morris L.J. thought that he had authority but did not properly exercise it. However, the court was unanimous that any defect in the appointment was whitewashed by paragraph 20 (2) of the Ninth Schedule to the Agriculture Act, 1947, and, further, that, as a result of section 92 of the 1947 Act together with paragraphs 15 and 16 of the First Schedule to the Acquisition of Land (Authorisation Procedure) Act, 1946, the Minister's certificate could not in any case be challenged except within six weeks of service of notice of the giving of the certificate.

Attention is drawn to the note at the end of the commentary on p. 514 of Volume 18, in regard to the change in the law governing the constitution of agricultural land tribunals by section 4 of the Agriculture (Miscellaneous Provisions) Act, 1954.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Webber, Barclays Bank v. *Webber* [1954] 1 W.L.R. 1500; [1954] 3 All E.R. 712

Educational charity—boy scouts.—Vaisey J. had no difficulty in this case in holding that a gift to the Boy Scouts for uniforms and camping equipment was a gift to an educational charity. The Charter of the Boy Scouts Association was put in evidence and described its objects as the instruction of boys in discipline, loyalty and good citizenship. The learned judge followed a case reported only in *The Times* in 1932, no doubt supplied to counsel from the archives of the Scouts. Scouting appears clearly to provide important elements of education in the wide sense. Although it was inspired by military events in South Africa it is not a political

organisation or a strategic force. That scouting experience may later be of value in military service to the nation is no objection but an advantage. A gift to the scouts is not like a gift to achieve political ends. No reference was made to the attitude of the scouts to persons of extreme political views.

(Theobald 338.)

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Cameron, Currie v. *Milligan* [1954] 1 W.L.R. 1375; [1954] 3 All E.R. 329

Will—Annuity—Continuing charge on income.—In this case a testator directed that one-third of the income of a trust fund should be paid to his widow but that it should be brought up to a considerable minimum sum, tax-free, if her third fell below that sum in any year. The report does not give the full facts of this case. The whole income of the fund is stated to have been far less in recent years than the minimum income to which the widow was entitled, yet it appears that there had been for some previous period a surplus which had been accumulated. The widow claimed to make good deficits in her annuity in recent years out of these accumulations. To do so she had to establish that her annuity was a continuing charge on the income of the fund.

Roxburgh J. pointed to the difficulty of deciding what the testator intended to happen in a case of this kind, as the testator obviously never anticipated the catastrophic rise in rates of tax which in the result frustrated his plans. The learned judge was compelled to seek a solution in some minute indications in the language of the will, though one suspects the testator was indifferent to such fine distinctions himself. The will referred to the disposal of surplus income subject to the wife's share in "part" of the income, which suggested that the rest of the income was not meant to be frozen indefinitely in case recourse to it to meet future deficits was needed. The provision for supplementation of the share of income referred to a deficit "in any year" being made good "in respect of that year." Roxburgh J. considered that this referred to surplus income of the same year, though he admitted the other construction was equally plausible. The will did not say "out of income of such year" or use any equally clear expression. The words "in respect of" are proverbially vague and to be avoided by draftsmen.

The learned judge frankly underlined the contradictory cases which exist in this field and indicated which he thought correct. Textbooks should be equally frank and not attempt to reconcile the irreconcilable.

(Theobald 426.)

Mousley v. *Rigby* [1954] 3 W.L.R. 891; [1954] 3 All E.R. 553

Will—vesting—date of distribution—substitutionary gift.—The testator gave a life interest to E, with a gift of residue to J, providing that, if J were already dead when E died, J's share should go to his children then living and the issue of children then dead. This was construed as a gift to the whole class of living issue of J at the death of E. They took *per stirpes* as the will expressly stipulated to that effect. The substitutionary gift to issue was "to issue of such as shall be then dead leaving issue." If a child of J had died leaving a grandchild the latter would take to the exclusion of the child. Equally, as "issue" refers to indefinite descent, a great-grandchild of J would take independently if the grandchild had predeceased E. As soon as E died it was necessary to list all the then living descendants. The effect was to eliminate any child, grandchild or remoter issue who had predeceased E. The learned judge followed *Re Embury* (1913) 109 L.T. 511 and declined to follow *Re Orton* (1866) L.R. 3 Eq. 375. Yet the textbooks attempt to state the law so as to reconcile these two cases.

(Theobald 574, 575.)

Re Follett, Barclays Bank v. *Dovell* [1954] 1 W.L.R. 1430; [1954] 3 All E.R. 478

Will—accidental omission—court supplies omission from book of forms.—This is another case in which the report is not immediately self-explanatory. A precedent (*Key and Elphinstone,* 11th ed., Vol. 2, p. 901) for a special power of appointment to children referred to appointing the trustees of the settlement "or other persons" to act as discretionary trustees. The draftsman of the will omitted part of the precedent so that the power of appointment read as a power to appoint to the children or any other persons, which would have made it a general power. Roxburgh J. decided that the court could take notice of the practice and of the existence of this form and supply the missing words. He was able to do so because the terms of the will made no sense. They referred to a power to appoint to "one or more or others" of the donee's issue. The phrase "one or more" conveyed the complete sense without the words "or others" and this surplusage put the reader on suspicion that something had gone wrong and opened up an inquiry into what had happened. The precedent referred to "one or more exclusively of the others or other," and the draftsman must have glanced away and then resumed his work at the words "or any other persons" further down the form, where it was dealing with the trustees. The case seems extreme on first appearance but is clearly within the principle of supplying omissions. The practice of conveyancers is given full weight in the Chancery Division. No-one can doubt that the result is what the testator must have intended and that the error was clear on the face of the will. *Re Smith* [1948] Ch. 49 was followed.

(Theobald 642.)

5. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Watson v. *Secretary of State for Air* [1954] 1 W.L.R. 1477; [1954] 3 All E.R. 582.

Compulsory purchase—measure of compensation—purchase under Defence Acts.—This case was mentioned at 18 *Conveyancer* 426, as an instance of a case of compulsory purchase under powers antedating the Lands Clauses Act, 1845. It subsequently came before the Court of Appeal which held that a yearly tenant of agricultural land is entitled in such a case (under Acquisition of Land Act, 1919, s. 2, Rule 2) to the market value of his interest, notwithstanding a clause in his tenancy agreement purporting to entitle the landlord to take part of the land at any time for non-agricultural use; that this value includes the loss of profit from standing crops left on the land when it is compulsorily taken and from any further crops that could have been grown on the land in the period before notice to quit could take effect; but that the tenant cannot recover loss of profit on future crops over again under Rule 6, as "compensation for disturbance." Quite so.

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6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from the *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.).)

Waterloo Main Colliery Co., Ltd. v. *C. I. R.* [1954] T.R. 373 (Ch.D.); 47 R. & I.T. 741

Income Tax—Surtax direction—nature of company

Statutory provisions: *Finance Act,* 1936, s. 20 (1) (now Income Tax Act, 1952, s. 257).

Point: In deciding whether a company is an "investment company" or not, the past history of the company as a trading company may be disregarded if there has been a definite change in the type of business carried on.

This case may be useful where a new company holding investments only later starts to trade.

Facts and Decision: The appellant company until December 31, 1946, carried on the trade of a colliery proprietor. At midnight on

that date its business vested in the National Coal Board and its income had since then consisted wholly of unearned income.

Held: Despite thirty-four years of trading the company became an " investment company " on January 1, 1947.

Page v. *Pogson* [1954] T.R. 359; 47 R. & I.T. 760

Income Tax—Trading—single transaction

Statutory provisions: *Income Tax Act*, 1918, s. 237 (now Income Tax Act, 1952, s. 526, " trade ").

Point: This is a further example of the single transaction being a trade.

It is interesting, as a previous similar transaction was held not to be a trade, the difference between the two being purely a question of the taxpayer's intention.

Facts and Decision: The taxpayer, a clerk of works, resigned his appointment in September, 1946. In November, 1946, he purchased a plot of land and between then and December, 1948, he erected a bungalow on that plot, doing the work himself. He and his wife lived in the bungalow until May, 1949, when he sold it at a profit. He then repeated the process. The second bungalow was sold when he took up a new appointment in October, 1951. The taxpayer was assessed for the profit on the sale of each of the bungalows, such profits being brought in charge to tax in the respective years of assessment in which they were received. The General Commissioners found that " the appellant had not built his first bungalow with the idea of resale or of carrying on the business of a builder. . . ." and hence that the profit made on sale was not taxable. They further found " . . . that the success of the first transaction encouraged the appellant to build the second bungalow as a business venture and that the profits on the second bungalow were taxable." The profit on the second bungalow, they held, should be credited to the year of receipt.

Held: (1) As to the trade: there was evidence to support the Commissioners' finding as to the trade and the appeal was (somewhat reluctantly) dismissed.

(2) As to the year of assessment: the normal time to ascertain profit is on sale and the profit was correctly brought into charge in the year of receipt and not spread over the two and one half years of building.

Burton v. *Rednall* [1954] T.R. 329; (1954) 47 R. & I.T. 698

Income Tax—Travelling expenses

Statutory provisions: Rule 9 of the Rules applicable to Schedule E, Income Tax Act, 1918 (now Income Tax Act, 1952, 9th Schedule, rule 7).

Point: Even though a car is essential at work, extra expense over and above the train fare incurred by using the car for travelling from home to work is not a deductible expense.

Stevens v. *Britten* [1954] 1 W.L.R. 1340; 98 S.J. 748; [1954] 3 All E.R. 385; [1954] T.R. 381; 47 R. & I.T. 697 (C.A.).

Income Tax—Partnership liability

Statutory provisions: Rule 10 of the Rules applicable to Cases I and II of Schedule D to the Income Tax Act, 1918 (now section 144 of the Income Tax Act, 1952).

Point: A sum due for tax pursuant to an assessment made on a partnership under what is now section 144 (1) of the Income Tax Act, 1952, constitutes a debt or liability of the partnership in whose name the assessment is made.

Facts and Decision: The plaintiff and the defendant entered into a deed of dissolution whereby the partnership between them was dissolved; the plaintiff assigned his interest in the business to the defendant, and the defendant covenanted with the plaintiff that he would (*inter alia*) "duly pay and satisfy all debts and liabilities of the said partnership and will at all times hereafter keep the retiring partner indemnified against the said debts and liabilities." An assessment to tax under Schedule D was made in the name of the firm for the year in which the dissolution occurred and the plaintiff paid half the assessment.

Held, reversing the decision of the Guildford County Court, that the plaintiff could recover the tax paid by him from the defendant under the covenant as a debt or liability of the partnership.

Evershed M.R. (1 W.L.R. at p. 1342) approved the statement in Simon's *Income Tax* (2nd ed.) vol. 1, at p. 337: "The tax assessed in the firm name is a partnership debt for which all who were partners at the time when the debt was incurred, or who have held themselves out to the Revenue to be such, are jointly liable. This means that any or all of those persons may be sued for the whole of the tax due (when the assessment becomes final) without reference to their respective shares under the partnership agreement."

Bambridge v. *C. I. R.* [1954] 1 W.L.R. 1460; 98 S.J. 851; [1954] 3 All E.R. 682; [1954] T.R. 375 (C.A.).

Income Tax—Transfer of assets—associated operations

Statutory provisions: *Finance Act*, 1936, s. 18 (now Income Tax Act, 1952, s. 412).

Point: Before charging an individual ordinarily resident in the United Kingdom to tax on any income of a person resident or domiciled abroad it is necessary to show (i) that there has been a transfer of assets; (ii) the individual has by means of the transfer either alone or in conjunction with associated operations, acquired rights; and (iii) by virtue of those rights the individual has power to enjoy the income. A residuary bequest in a will may be an "associated operation" within the meaning attached to that phrase by Income Tax

Act, 1952, s. 412 (4). Death is not an associated operation but neither does it break the chain if rights already acquired merely fall into possession on the death.

It is, perhaps, interesting to speculate whether a suicide might be an " associated operation."

Facts and Decision: The appellant's father and mother transferred assets in 1933 to a Canadian company in return for shares and debentures. The father settled his shares and debentures on trust (so far as is material) for himself for life with remainder to the mother for life with remainder to the appellant for life. A power of revocation was retained by the father but was never exercised. The mother similarly settled her shares and debentures, except that she took the first life interest. The mother revoked her settlement after the death of the father, and her shares and debentures passed under the residuary bequest in her will, not being specifically mentioned therein, and the appellant received a life interest therein.

It was not contested that a transfer of assets had been made or that the appellant had acquired rights by virtue of which she had power to enjoy the income of the Canadian company. The appellant contended, however, that she did not acquire those rights by means of the transfers " either alone or in conjunction with associated operations." In respect of the interest under her father's settlement the appellant asserted that she acquired her rights by virtue of (a) the transfer; (b) the settlement; and (c) the deaths of her father and mother, and that the deaths not being associated operations the rights were not connected to the transfer. In respect of the interest under her mother's will it was argued that as the will did not refer to the shares and debentures it was not an operation " in relation to the assets transferred " and thus not an associated operation. Alternatively it was said that the will effected nothing as it was also necessary before any rights were acquired for the mother to predecease the appellant without having revoked the will.

Held: (1) In the case of the father's settlement (affirming the decision of Harman J.): that the deaths were not associated operations, but that the rights were acquired under the settlement which was an associated operation and the tax was therefore leviable.

The deaths were " merely events on the happening of which the rights acquired by the taxpayer by means of the transfer and settlement . . . fell into possession by virtue of the terms and provisions of the settlement itself. . . . An interest in remainder, or, for that matter, a contingent interest given by settlement, is given by means of the settlement and not by means of the happening of the event which brings the interest into possession or, as the case may be, fulfils the contingency."

(2) In the case of the mother's settlement (reversing the decision of Harman J.): that the death of the mother was merely the fulfilment of a condition essential to the efficacy of the will and that the rights were acquired under the will which was an associated operation. Tax was therefore leviable. " Where a testator has made a will containing a residuary gift, he has made a will in relation to every item of property comprised in that gift, just as much as he would have done if he had disposed of each item comprised in the residuary gift." The

fact that a succession of persons may thus become liable merely emphasises the penal nature of the section and it is clearly decided that persons in no way parties to the transfer may be made liable (*Congreve* v. *C. I. R.* [1948] 1 All E.R. 948).

Jenkins L.J. remarked, *obiter,* that the will being made before the transfer would not prevent it being an associated operation, the power to revoke the will not having been exercised. He further expressed the view that mere inactivity resulting in intestate succession might well not be an "associated operation" and that persons so taking might escape liability.

Heelex Investments, Ltd. v. *C. I. R.* [1954] 1 W.L.R. 1368; 98 S.J. 788; [1954] 3 All E.R. 379; [1954] T.R. 345; 47 R. & I.T. 759 (Ch.D.)

Profits Tax—Group assessments on principal company

Statutory provision: Finance Act, 1937, s. 22.

Point: A notice given under Finance Act, 1937, s. 22, effectively causes profits or losses of the subsidiary in the chargeable accounting periods to which the notice relates to be treated as profits or losses of the principal company for the purpose of profits tax whether or not the principal company is liable to pay profits tax. Thus, if the principal company is a statutory undertaker or has been made the subject of a direction under Income Tax Act, 1952, s. 245, no profits tax is recoverable from either the principal company or its subsidiary.

Re Hall's Settlement, Sanderson and Others v. *C. I. R.* [1954] 3 W.L.R. 675; 98 S.J. 788; [1954] 3 All E.R. 435; [1954] T.R. 361; 47 R. & I.T. 728 (C.A.)

Estate Duty—Valuation

Statutory provisions: Finance Act, 1894, ss. 2 (1) (*c*) and 7 (5); Finance Act, 1940, s. 55.

Point: The special method of valuation laid down by Finance Act, 1940, s. 55, applies not only where shares actually pass but also where they are deemed to pass. Property within Finance Act, 1894, s. 2, is subject to precisely the same liability to estate duty as property within section 1 and that which is enacted in relation to property passing on a death applies equally to property which is deemed to pass.

The section was certainly interpreted in this manner by the draftsman of the 1954 Finance Act—in the proviso to section 29 (5) thereof.

Facts and Decision: The deceased, a shareholder owning over 50 per cent. of the issued share capital of the company, settled some shares on his children. He died just over a year later and duty became payable under Finance Act, 1894, s. 2 (1) (c). It being undisputed that the company was one to which Finance Act, 1940, s. 55, applied, the trustees of the settlement nevertheless contended that the valuation

should take place by reference to the open market price under Finance Act, 1894, s. 7 (5). The agreed value was £90 10s. per share on the "assets" valuation, but only £22 10s. per share on the "open market price" valuation.

Counsel for the trustees contended that the opening words of section 55, "Where for the purposes of estate duty there pass on the death of a person" meant "actually pass."

Held, affirming the decision of Upjohn J., that the shares fell to be valued under section 55.

Leave to appeal to the House of Lords was granted.

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7. *MISCELLANEOUS*

R. v. *Lancaster Quarter Sessions, ex p. Huyton-with-Roby U.D.C.* [1954] 3 W.L.R. 597; [1954] 3 All E.R. 225

Dustbins—landlord and tenant—Public Health Act, 1936, *s.* 75—*costs.*—In this case the local authority served a notice on the landlord of a dwelling-house to provide a dustbin under the Public Health Act, 1936, s. 75, and the landlord appealed to the magistrates' court under section 300 on the ground that the tenant should provide the dustbin. The court decided in favour of the landlord but, without hearing any argument, decided that they would make no order as to costs. The landlord appealed to quarter sessions, which varied the magistrates' court by awarding the landlord his costs in the magistrates' court. The local authority took the matter to the Divisional Court, who held that a successful appellant before justices from a decision of a local authority has a legal right entitling him to ask for his costs and to have his application considered by the justices in a judicial manner. Unless in the exercise of that discretion they feel bound, on proper reasons, to refuse costs, he is entitled to them in the ordinary way.

CORRESPONDENCE

To the Editor,

The Conveyancer & Property Lawyer.

Dear Sir,

The exercise of statutory powers by local authorities

I was very interested in the article by Mr. West in the September–October number of *The Conveyancer* under the above heading (Vol. 18, at p. 504). Apart, however, from the change in the law, in that the tenancies of houses where a local authority are the landlord are now not subject to the Rent Acts (Housing Repairs and Rents Act, 1954, s. 33), I wonder whether the learned author of the article has not over-stated his case.

I do not consider that the doctrine of *ultra vires* to which local authorities, being very largely creatures of statute are subject—and one could of course argue that even this does not always apply: *Att.-Gen.* v. *Leicester Corporation* [1943] Ch. 86—can be extended so as to cover the French "détournement de pouvoir," as suggested by Mr. West, nor, I submit, do the cases cited by him support such an argument. *Pilling* v. *Abergele U. D. C.* turned on a strict construction of the statute, and so did *Marshall* v. *Blackpool Corporation.* The *Wednesbury Corporation Case* cited is certainly sound support for Mr. West's view, but it should be noted that this was merely an action for a declaration—a remedy with no power behind it—which was refused, and so the remarks cited are to some extent *obiter*; moreover Lord Greene also said, "the courts can only interfere with an act of an executive authority *if it can be shown that the authority have contravened the law*" (italics mine). I also beg to doubt whether the validity of a compulsory purchase order duly confirmed and made in due form, could be questioned in the High Court under para. 15 of the 1st Schedule to the Acquisition of Land (Authorisation Procedure) Act, 1946, on the ground that it was made for some improper motive, especially in view of the recent Court of Appeal decision in the famous case of *Woollett* v. *Minister of Agriculture and Fisheries.*

Yours faithfully,

J. F. Garner.

Andover, November 17, 1954.

THE LIBRARY

Williams on Wills. 1954 Supplement. London: Butterworth & Co. 62 pp. (10s. 6d.).

This supplement is most thorough and extremely useful to owners of the main work. The Intestates' Estates Act, 1952, and the new Probate rules are referred to, and all the important recent cases, of which there have been so many, such as those concerned with general and special powers and frauds on powers, conditions precedent and subsequent, and restraints on alienation.

The opportunity has been taken to re-write some sections but, in general, the author, W. J. Williams, has not reacted to any of the suggestions for amplification of the existing text of the main work made by the present reviewer. Perhaps this will be done with later editions of the work.

Most of the material is a substitute or additional text for the main work. Here and there, however, the material appears to be a case note which is rather too full for that purpose, and presumably a shorter résumé will appear in the main work later.

A. K. R. K.

Cheshire's Modern Law of Real Property. Seventh Edition. By G. C. Cheshire, D.C.L., F.B.A., Barrister-at-Law, with an appendix on the Rent Acts by J. B. Butterworth, M.A., Barrister-at-Law. London: Butterworth & Co. (Publishers), Ltd. lxi and 818 pp. and Appendix (80 pp.) and Index. (47s. 6d.)

This is a "new-look" Cheshire quite apart from the Appendix, for the first part, which describes estates and interests in land, has been radically rearranged. The general introduction and the chapter on the fee simple are now followed by a discussion of settlements and trusts for sale, including all the equitable beneficial interest arising thereunder. Leases, easements and profits, restrictive covenants, rent charges and mortgages are relegated to third place under the head of "Commercial Interests." The author has come to the view that since the classic law of real property developed round the family settlement, it is logically and historically desirable to give that part of the law prior place. There is force in this contention, yet the legislative reforms of the best part of a century, culminating in the 1925 Acts, have steadily separated family interests from the land and made them enforceable only against the trust fund for the time being. Moreover, most of this law now applies equally to personal property. One would, therefore, have preferred to see students introduced first to those interests enforceable against the land, after the very adequate outline of the historical development and structure of the law contained in the introduction (pp. 1–104). On this basis the discussion of the creation of settlements in conjunction with the fee simple is welcome, for here the framers of the 1925 legislation were concerned to establish in all cases an estate owner with powers of disposition: it is however regretted that the powers of the tenant for life remain in the chapter on life interests, for they attach to estate ownership, not to one particular equitable interest. Beneficial interests under settlements, though, might well have remained in their former place. Arrangement is, however, a matter of

opinion if not of controversy—there is no golden rule. Unreserved tribute must be paid to Professor Cheshire's fresh and flexible approach to his subject; few authors, surely, can have subjected their own work, while enjoying a pre-eminence in its sphere of some twenty-five years' standing, to such detached and critical reconsideration in the interests of the students who read it.

Other changes are of a comparatively minor nature. Throughout, passages have been rewritten in the interest of clarity and the law brought up to date. It is interesting to see that with the abolition of development charge planning legislation is now held to impose severe restrictions on enjoyment (pp. 119–26) and not, as before, to alter the nature of the fee simple (6th ed., pp. 113–5). Professor Cheshire adheres to his view that licences constitute a new equitable interest in land (pp. 68, 464–7) but here fuller treatment would be welcome, especially as *Bradley-Hole* v. *Cusen* [1953] 1 Q.B. 300 is not cited. The doctrine of "feeding the estoppel" is omitted, but might have been included as a topical illustration of the relation between legal and equitable interests.

Both Professor Cheshire's decision to include the Appendix in the interests of realism (Preface, p. vi) and Mr. Butterworth's admirable account are to be warmly applauded. Legislative control of the relationship between landlord and tenant is now a permanent phenomenon which academic study of the law cannot afford to ignore. It was, this reviewer submits, entirely correct to apply the same standards of exposition to this topic as to the others in the book. This subject is inevitably complex, but the eighty pages of the Appendix, achieving a nice balance between the wood and the trees, should open to students a door through which hitherto they have been able to take only fitful and fearful peeps. (One wishes that the misprint on p. 850 had conferred "statutory tights" on the landlord rather than the tenant!)

It is difficult, in a necessarily short review, to do justice to this edition of Cheshire; it is hoped that sufficient has been said to show that it both maintains the well-known standards of its predecessors and brings fresh stimulation of its own to the study and teaching of the land law.

F. R. C.

Moore's Practical Agreements. Ninth Edition. By J. Watson-Baker, M.A., and T. L. Dewhurst, M.A., M.C., Barristers-at-Law. Butterworth & Co. (Publishers), Ltd. xli, 444 and 52 pp. (47s. 6d.)

There is a wealth of precedent books dealing with normal conveyancing matters from so-called desk books to encyclopaedias, but there is a dearth of precedent books covering other forms of instruments, and it is hardly surprising, therefore, that Moore's *Practical Agreements* has run to nine editions. The precedents are arranged under subject heads in alphabetical order from Adoption of Children to Teaching. In view of the existing works on ordinary conveyancing, an undue amount of space seems to have been allotted to it, for there are 13 precedents of sales of businesses, 10 on easements, 27 on landlord and tenant, 24 on mortgages and 39 on sale of land. We doubt very much whether a practitioner would use *Moore* for a precedent for a contract of sale of land, particularly when it is borne in mind that quite properly, conveyances, etc., are not included. On the other hand, there are no powers of attorney (no doubt on the footing that they are not agreements), nothing under licences (whether of land or otherwise), nothing under sale of goods and nothing under patents.

The precedents included vary considerably in quality: the form of offer of sale of land subject to contract and the form of acceptance (pp. 338 and 340) seems hardly worthy of inclusion, and surely it is rather late in the day to set out an agreement for sale of an advowson (p. 15); the agreement with an estate

agent to sell land might well prove a trap to the vendor, who would not normally expect to pay commission if the purchaser failed to complete (p. 14); and the building agreement (p. 65) does not apparently provide for insurance. We welcome, however, such precedents as that for maintenance, not being a separation agreement (p. 407) and the short agreement for an equitable charge (p. 284). Footnotes such as "stamp to be adjudicated" (p. 21) which might be excusable in a first edition, should not appear in a ninth; references to "solicitors and attorneys" are obsolete.

The general impression one gets is that there is a good deal of useful material mixed with a good deal that is not so useful, and that some circumspection is required in using the book. It is only fair, however, to mention how difficult it is to come by useful precedents on many subjects, as they lie secreted in the bosoms of practitioners all over the country, and never appear to be the subject of litigation. Publishers and editors would welcome such precedents. We mention two phrases in conclusion: the "one third undivided space" on p. 111 is not a new species of realty but, alas, merely a misprint; and, no doubt, it is our warped sense of humour that caused us to consider how one measures "the longest liver of the purchaser and the purchaser's wife."

E. F. G.

The Taxation of Gifts and Settlements including Pension Provisions by Stamp Duty, Estate Duty, Income Tax and Surtax. Second edition. By G. S. A. WHEATCROFT, M.A., a Master of the Supreme Court. Sir Isaac Pitman & Son, Ltd. xxix and 173 and (index) 20 pp. (42s.)

It is not surprising that this useful book has run to a second edition in twelve months, and the author has successfully incorporated references to the changes effected by the Finance Act, 1954, and the important decisions reported since the first edition.

There are a few blemishes, such as the failure to correct the reference to the current tax year in the first line of Appendix C and to delete the obsolete note on p. 173; it is an established fact now that the top rate of tax is 19s. in the £. There are also still several references to the Weekly Law Reports where cases have, since the first edition, found their way into the Law Reports proper, though in fairness it must be said that the table of cases does in most instances contain the later reference. The list of securities free of income tax and estate duty to non-residents on p. 109 should be revised by deleting those which have been redeemed, and as the estate duty exemption is referred to the list by the note on p. 63, it is important to note that most issues of National Savings Certificates are also duty-free to non-residents.

Although the rewritten chapter on pensions is certainly an excellent summary of the law, this is scarcely *ejusdem generis* with the principal contents of the book, and do the twelve pages on this subject really justify the inordinate lengthening of the title?

The concessions mentioned on p. 72, whereby in some cases for the purposes of estate duty accountable persons could elect to treat certain property as settled or unsettled, at their option, were in the main expressly excluded by the terms of the Finance Act, 1954, and as to the remainder, the Estate Duty Office have now indicated that they are no longer available.

Leaving on one side these comparatively trifling criticisms, the book is unquestionably of real value to the practitioner. The author deals on pp. 37 and 163 with some of the interesting results of *Sneddon* v. *Lord Advocate* [1954] A.C. 257. Following this case, he has suggested several possible schemes for avoidance of estate duty by transactions within five years before

death which are well worth while considering, such as the gift of shares in a company which is liquidated before the death (see *The Conveyancer,* Vol. 18, p. 106).

J. H. G.

Permanent Supplement to Woodfall's Law of Landlord and Tenant. Twenty-fifth edition. By LIONEL A. BLUNDELL, LL.M., and V. G. WELLINGS, M.A.(Oxon.), Barristers-at-Law. Sweet and Maxwell Ltd. xx, Noter-up, 345 and (index) 21 pp. (30s.)

The Landlord and Tenant Acts, 1927 *and* 1954. By LIONEL A. BLUNDELL, LL.M. and V. G. WELLINGS, M.A.(Oxon), Barristers-at Law. Sweet and Maxwell, Ltd. xvi, 238 and (index) 13 pp. (25s.)

The first of the above two books, the Permanent Supplement to the twenty-fifth edition of Woodfall includes the material contained in the second plus material on the Housing Repairs and Rents Act, 1954. It is, however, convenient to have in the form of a separate and self-contained publication the new code constituted by the Landlord and Tenant Act, 1954, and what remains of the Landlord and Tenant Act, 1927.

The legal profession owe a debt of gratitude to the learned editors of Woodfall for having so speedily dealt with the two major Acts on the subject of landlord and tenant passed since the publication of the twenty-fifth edition of that classic textbook. The new material has been analysed and expounded with the same high standard of care and skill as was manifested in the principal work. It goes without saying that all who possess the latter must obtain a copy of the Supplement.

The opinion expressed by the authors of the Supplement on the question whether section 24 (3) (b) of the Landlord and Tenant Act, 1954, can be construed as a transitional provision, so as to save the operation of an ordinary notice to quit given between the passing (July 30, 1954) and the commencement (October 1, 1954) of the Act, has been quickly confirmed by Devlin J. in *Orman Bros.* v. *Greenbaum* [1954] 1 W.L.R. 1520. (The answer is that it cannot be so construed.)

An example of the care with which the Supplement has been prepared is to be found in the excellent note of pages 6–7 on the exclusion of agricultural holdings from Part II of the Landlord and Tenant Act, 1954. The learned authors have probed beneath the surface here and brought something interesting to light.

The statement on page 9 and page 28 that a non-resident tenant of a Rent Act controlled dwelling-house (*i.e.*, where there are mixed residential and business premises) may enjoy the benefit of Part II of the Landlord and Tenant Act, 1954, is at first surprising, and on closer examination appears to be open to doubt. What about section 23 (1), section 23 (3) and section 32 (1)? Surely the tenant must occupy in order to secure protection?

The second part of the Supplement deals with the Housing Repairs and Rents Act, 1954, in so far as the subject-matter of the Act falls properly within the sphere of the law of landlord and tenant. It may be noted that the authors' view on the application of "the stopper" to cases where the landlord has served a notice of election under section 30 (3) is controversial (pages 253–4). The view taken by the authors and others is opposed to that of the Ministry of Housing and Local Government supported by R. E. Megarry and others. This is a battle of giants, and it is to be hoped that there will soon be a decision which will spare us the need to take sides.

Some readers may wish that the authors had expressed their views on one or two of the other doubtful points already evident to those who have to understand and operate the Act, *e.g.*, the meaning of "a building" in paragraph 7 (3) of the Second Schedule, the precise scope of the words "an express liability" in section 30 (3), and what happens if it is desired to make a belated claim to the 40 per cent increase, in the case of dwellings subject to "old control," in view of the fact that the prescribed form of notice has disappeared with the revocation of the Rent Restrictions Regulations, 1940. There is, however, a limit to the extent to which it is proper in a work of this kind to speculate on the solution of unsolved difficulties. Let us be grateful for the timely and valuable help which has been given us.

Each publication includes as appendices the full texts of the statutes concerned, the regulations made thereunder, new rules of procedure and both statutory and non-statutory forms.

J. M. W.

An Outline of Planning Law. Second edition. By Desmond Heap, ll.m., l.m.t.p.i. Sweet and Maxwell, Ltd. xxxvi and 204 pp. (25s.)

As might have been expected, the spate of books on the Town and Country Planning Act, 1954, is upon us, before there has been any time for the courts or practice in the Lands Tribunal to have interpreted its intricate provisions in decided cases. Nevertheless, we can recommend the purchase of this book by practitioners, because:

(1) it is *not* just a book on the 1954 Act and (*a fortiori*) not an annotation of the Act, but an extremely workmanlike integration of the Act into the existing law;

(2) it also reviews the rest of planning law—after all Part III of the 1947 Act is almost unaffected by the 1954 Act—although the cases on enforcement notices could perhaps have been discussed more fully;

(3) it is written in a readable manner, and will be indispensable (as was the first edition) for the student, and will give a great deal of sound guidance to the professional man in practice;

(4) it is by Heap—one of the few writers who we feel, does really understand the Planning Acts, in so far as they are intelligible at all.

On the other hand, it must be remembered that this is only an "Outline," and the answer to every problem must not be expected here; for example the Minister has suggested a standard form of tree preservation order (see p. 81), and the relationship between the local land charges register and planning charges, and the enquiries that should be made by a purchaser are not discussed, nor is that excrescence on planning law proper, the National Parks and Access to the Countryside Act, 1949.

The book is well produced and adequately equipped with the usual apparatus of indices and tables. The first edition established itself, and this edition maintains its high standard for clarity and accuracy.

J. F. G.

We have also received:—

Supplement to Preston and Newsom's Limitation of Actions. Third Edition. By G. H. Newsom and Lionel Abel-Smith, Barristers-at-Law. The Solicitors' Law Stationery Society, Ltd. 20 pp. (3s. 6d.) This supplement contains the text of the Law Reform (Limitation of Actions, etc.) Act, 1954, with a note on it, and a noter-up.